No. 16-1215	
Title:	**Lamar, Archer & Cofrin, LLP, Petitioner** **v.** **R. Scott Appling**
Docketed:	April 11, 2017
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-11911)
Decision Date:	February 15, 2017
Questions Presented	

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May 25 2017	Brief of respondent R. Scott Appling in opposition filed.
May 30 2017	DISTRIBUTED for Conference of June 15, 2017.
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Nov 09 2017	Brief amicus curiae of United States filed.
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No.

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LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code prohibits the discharge of "any debt . . . for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2). Three Circuits have held that a statement concerning a specific asset of the debtor cannot be a "statement respecting the debtor's . . . financial condition." Two Circuits, including the Eleventh Circuit below, have held that it can be. Based on that interpretation, the Eleventh Circuit here reversed the bankruptcy court's conclusion that the debt at issue "is nondischargeable," App. 14a, even though it is based on a fraudulent statement.

The question presented is whether (and, if so, when) a statement concerning a specific asset can be a "statement respecting the debtor's . . . financial condition" within Section 523(a)(2).

RULE 29.6 STATEMENT

Petitioner Lamar, Archer & Cofrin, LLP, is a limited liability partnership. Petitioner has no parent corporation, and no publicly held company owns 10% or more interest in the partnership.

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PETITION FOR A WRIT OF CERTIORARI

Lamar, Archer & Cofrin, LLP (Lamar) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 848 F.3d 953. The opinion of the district court (App. 20a-44a) is unreported. The order of the bankruptcy court denying respondent's motion to dismiss (App. 67a-81a) is reported at 500 B.R. 246. The bankruptcy court's findings of fact and conclusions of law (App. 45a-66a) are reported at 527 B.R. 545.

JURISDICTION

The court of appeals entered judgment on February 15, 2017. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, provides in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> (B) use of a statement in writing—

> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . . .

STATEMENT

This case concerns an expressly acknowledged and now entrenched circuit conflict over the meaning of a provision of the Bankruptcy Code dealing with the dischargeability of a commonly recurring type of debt. One of the time-honored rules of bankruptcy is that it is intended to provide a fresh start for the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). In keeping with that objective, the Bankruptcy Code provides broad relief for individual debtors, but prohibits the discharge of debts that result from dishonest or fraudulent conduct. This case concerns whether Congress intended to drive a truck through that general policy, or just tweak it to address a particular situation that had arisen, when it amended Section 523(a)(2)(A) of the Bankruptcy Code.

Section 523(a)(2)(A) of the Code generally bars the discharge in bankruptcy—whether under Chapter 7, 11, 12, or 13—of debts obtained by "false pretenses, a false representation, or actual fraud," with one exception: a debt obtained by fraudulent means where the fraud consists of a false "statement respecting the debtor's . . . financial condition." This "financial condition" exception was added to the Code in 1960 to address the practice among certain consumer finance companies of coaxing loan applicants into submitting

false or misleading financial statements in order to insulate (or arguably insulate) the resulting debts to the bank from any future discharge in bankruptcy. *See Field v. Mans*, 516 U.S. 59, 76-77 & n.13 (1995).[1] In response, Congress singled out such debts and subjected them to additional rules before they could be exempted from discharge. *See* 11 U.S.C. § 523(a)(2)(B).

The question presented in this case is whether a false statement that concerns a *specific* asset—as opposed to a debtor's financial health more generally, as is typically required, for example, by an application for credit—is a "statement respecting the debtor's . . . financial condition," such that a debt obtained on that basis is dischargeable unless it meets the heightened standard in Section 523(a)(2)(B). In this case, the debtor (respondent) intentionally made a false statement to the creditor (petitioner) about an "anticipated tax refund"—a single asset—in order to receive an extension of credit on services that he had secured and hoped to continue to receive. App. 6a. The bankruptcy court and district court held that this was *not* a statement respecting the debtor's financial condition; the Eleventh Circuit held otherwise.

As the Eleventh Circuit below recognized, "[t]he circuits and other federal courts are split on this question." *Id.* The Fourth Circuit has held that a statement about a single asset can be a statement

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[1] In *Field*, this Court considered "the level of a creditor's reliance on a fraudulent misrepresentation necessary to place a debt . . . beyond release" under Section 523(a)(2)(A), 516 U.S. at 61—a different issue than the one presented here. But in deciding that question, the Court discussed the history of the "financial condition" exception. *See id.* at 64-66, 76-77 & n.13.

respecting the debtor's financial condition, while the Fifth, Eighth, and Tenth Circuits have all held that it is not. In the decision below, the Eleventh Circuit sided with the Fourth, deepening the split and removing any doubt that it is here to stay until resolved by this Court. Particularly given the importance of uniformity in bankruptcy, there is no reason why this Court should tolerate the result where a common class of debts is dischargeable in some parts of the country but not others. The question presented warrants review, and this case presents an ideal vehicle to resolve it.

A. Factual Background

Petitioner Lamar, Archer & Cofrin, LLP (Lamar), is a law firm located in Atlanta, Georgia. In 2004, respondent R. Scott Appling hired Lamar and Walter Gordon to represent Appling in litigation against the former owners of a business he had recently purchased. App. 21a. Appling agreed to pay Lamar and Gordon on an hourly basis with fees due monthly. *Id.* As the litigation proceeded, Appling fell behind in his payments for the services he received. *Id.*

By March 2005, Appling owed Lamar more than $60,000 and Gordon $18,000 in unpaid legal fees. *Id.* Lamar informed Appling that if he were unable to bring fees current, Lamar would be forced to terminate its representation in an appropriate manner. *Id.* at 21a-22a. The parties met in Gordon's office on March 18, 2005, to discuss the situation. *Id.* at 22a.

At the meeting, Appling told Lamar and Gordon that he had consulted an accountant, and that he would soon be filing an amended tax return, entitling him to a tax refund of approximately $100,000—enough to cover current and future legal fees. *Id.* at 22a, 54a. Based on

that representation. Lamar and Gordon agreed to continue their representation of Appling. *Id.* at 41a, 62a.

In November 2005, Lamar and Appling met again to discuss the outstanding legal fees and Lamar's continued representation. In the November meeting, Appling informed Lamar that his accountant had improperly handled the amended return. *Id.* at 22a-23a, 57a-60a. As a result, Appling claimed, he had been forced to refile the return himself, and so had not yet received his refund. *Id.* at 23a, 57a-60a. Appling assured Lamar, however, that he still expected to receive an amount sufficient to cover all of his mounting legal fees. *Id.* at 22a. Once again, Lamar continued its representation of Appling on the basis of his assurances. *Id.* at 41a, 61a-62a.

Lamar and Gordon continued to represent Appling for approximately a year following the initial March meeting, eventually negotiating a settlement that drastically lowered Appling's remaining financial obligations to the former owners of his business, but generating additional legal fees as a result of their efforts. *Id.* at 48a-49a.

Appling's representations about his tax return were false. In June 2005, Appling did sign and submit an amended tax return. *Id.* at 22a, 48a. But that return sought a refund of only $60,718 (which was further reduced by the IRS to $59,851), not the approximately $100,000 he had represented. *Id.* Moreover, Appling received the refund in October 2005—prior to the November meeting when he claimed to have not yet received it. *Id.* at 22a, 48a-49a. And, contrary to his stated intent, Appling never paid any of the refund

money he did receive to Lamar or Gordon, but instead used it to pay other business expenses. *Id.*

When Lamar learned the truth in June 2006 that Appling had received the refund and invested it in his business, rather than paying his outstanding legal fees, Lamar demanded payment of all outstanding fees within 14 days. *Id.* at 23a. When Appling failed to satisfy Lamar's demand, Lamar sued Appling in Georgia state court, obtaining a judgment in the amount of $104,179.60 in October 2012. *Id.* Three months later, Appling and his wife filed for bankruptcy under Chapter 7, seeking to discharge all of their personal debts, including Lamar's judgment. *Id.*

B. Procedural History

1. Lamar initiated an adversary proceeding in the bankruptcy court for the Middle District of Georgia, seeking a determination that Appling's debt to Lamar was not dischargeable under 11 U.S.C. § 523(a)(2)(A) because it was obtained by fraud. Appling moved to dismiss the complaint, arguing among other things that the prohibition on discharging such debts did not apply because the alleged false statements about his tax refund were "statement[s] respecting [his] . . . financial condition." App. 70a (quoting § 523(a)(2)(A)).

In September 2013, the bankruptcy court denied Appling's motion. *Id.* at 67a-81a. "Two views have emerged on the proper interpretation of the phrase 'respecting the debtor's . . . financial condition,'" the court explained. *Id.* at 71a (citation omitted). Under the one view, the phrase includes "any communication that has a bearing on the debtor's financial position," including statements about a "single asset or liability." *Id.* (citation omitted). Under the other, the phrase

includes only "communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities." *Id.* (citation omitted). Adopting the latter view, the court held that the alleged misrepresentations about "a single asset, the tax refund," were not representations as to his "overall financial condition or net worth," and therefore refused to dismiss Lamar's complaint. *Id.* at 73a, 76a.

2. Following a two-day trial, the bankruptcy court issued its findings of fact and conclusions of law resolving the adversarial proceeding. *Id.* at 45a-66a. Among other things, the court found that Appling had indeed "knowingly made a false representation with intent to deceive when he represented" that his tax refund would be "approximately $100,000" and, later, that "he had not yet received the refund." *Id.* at 54a, 58a. The court further found that Lamar relied on Appling's representations regarding the tax refund, that it was justified in so doing, and that it was harmed thereby. *Id.* at 62a-66a. Accordingly, it held that Lamar's claim against Appling is not dischargeable under Section 523(a)(2)(A). *Id.* at 66a.

3. On appeal, the district court affirmed the bankruptcy court in all respects. *Id.* at 20a-44a. As to the meaning of Section 523(a)(2)(A), the district court recognized that "[c]ourts disagree whether to construe the phrase 'respecting the debtor's ... financial condition' broadly or strictly," and then canvassed the conflict in courts across the country. *Id.* at 25a-27a. "Finding the reasoning of the Fifth Circuit persuasive," the district court agreed with the bankruptcy court's interpretation and thus concluded that "[a] statement pertaining to a single asset is not a statement of financial condition." *Id.* at 27a-29a.

Because Appling's false statements concerned a "single asset" rather than his "financial condition" (i.e., his "net worth, overall financial heath, or equation of assets and liabilities"), the court affirmed. *Id.* at 30a.

4. The court of appeals reversed and remanded. *Id.* at 1a-19a. Like the courts before it, the court of appeals recognized that "[t]his appeal presents a question that has divided the federal courts"—namely, "Can a statement about a single asset be a 'statement respecting the debtor's . . . financial condition.'" *Id.* at 1a-2a (citation omitted). The court noted that the Fourth Circuit and several bankruptcy courts had held that "a debtor's assertion that he owns certain property free and clear of other liens" or similar statements *are* "statement[s] respecting his financial condition," the court observed. *Id.* at 6a (citation omitted). On the other hand, the court observed, the Fifth, Eighth, and Tenth Circuits, as well as several other bankruptcy courts, have held that "a statement about a single asset *does not* respect a debtor's financial condition." *Id.* at 6a-7a (emphasis added).

The court of appeals sided with the Fourth Circuit's interpretation of Section 523(a)(2)(A). "Whether by its ordinary meaning or as a term of art [in the Bankruptcy Code]," the court conceded, "'financial condition' likely refers to the sum of all assets and liabilities," or "one's overall financial status." *Id.* at 7a-8a. But even so, the court continued, "it does not follow that the phrase 'statement *respecting* the debtor's . . . financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (citation omitted). The term "respecting" is "defined broadly," the court said,

pointing to the *Webster's New International Dictionary* definition of the word. *Id.*

The court rejected Lamar's argument that such an interpretation of the phrase was inconsistent with the provision's targeted objective—as reflected in the legislative history—of preventing fraud while protecting debtors from creditors who sought to mislead debtors into submitting false or misleading financial statements, such as an application for credit, for the very purpose of insulating the creditors' claims from discharge. *See Field v. Mans*, 516 U.S. 59, 76-77 (1995). If Congress wanted to limit the provision to such "financial statements," the court of appeals observed, Congress could have said so. App. 10a. Because it did not, the court concluded that by "statement" Congress meant only to distinguish a debt obtained by an affirmative misstatement from one obtained by "a nonactionable omission." *Id.* at 11a.

In the end, the court of appeals concluded that the "text is not ambiguous." *Id.* at 12a. "[A] statement about a single asset can be a 'statement respecting the debtor's . . . financial condition.'" *Id.* at 14a. And, because Appling's statement did not meet all the requirements for nondischargeability in Section 523(a)(2)(B)—namely, the requirement that the false statement be in writing—the court held that Appling's liability to Lamar based on a fraudulent statement "can be discharged." *Id.* The court therefore reversed the bankruptcy court's and district court's ruling that "Appling's debt to Lamar is nondischargeable" and remanded. *Id.*

Judge Rosenbaum concurred, but disagreed with the panel's conclusion that the text was clear-cut. *Id.* at 14a-19a. Contrary to what "the panel seems to

think," she explained, "[s]tanding alone" "the words of the phrase 'statement respecting ... the debtor's financial condition' are *not* unambiguous." *Id.* at 15a (emphasis added). Indeed, as she noted, several other courts, including this Court and "[t]hree other circuits," "have understood the phrase to mean the opposite of what we conclude today." *Id.* at 15a-16a (citing *Field*). Nevertheless, based on her view of whether false statements were more likely to be made orally or in writing, she concluded that a "broad" interpretation was more consistent with Congress's intent. *Id.* at 19a.

REASONS FOR GRANTING THE WRIT

All the core criteria for certiorari are met. In its decision below, the Eleventh Circuit expressly recognized that it was deepening an existing circuit conflict on whether a false statement about a single asset can be a "statement respecting a debtor's ... financial condition," within the meaning of 11 U.S.C. § 523(a)(2)(A). Five Circuits have now decided that question. Three have held that a statement about a single asset is *not* a statement respecting a debtor's financial condition, while two others (including the Eleventh Circuit below) have held that it can be. The issue arises in bankruptcy courts across the country with remarkably frequency and is important to debtors and creditors alike. This case presents a clean vehicle for resolving this question. Moreover, the decision below is wrong and should not be allowed to stand. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens An Acknowledged Circuit Conflict

The circuit conflict presented by this case is as clear as can be. The Eleventh Circuit expressly recognized

that its decision deepens an existing conflict among the courts of appeals on whether a false statement about a specific asset can be a "statement respecting the debtor's . . . financial condition" within the meaning of 11 U.S.C. § 523(a)(2)(A). App. 6a-7a. Several other courts of appeals have recognized this conflict. *See, e.g.*, *In re Bandi*, 683 F.3d 671, 677 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 845 (2013); *In re Joelson*, 427 F.3d 700, 710 (10th Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006); *In re Lauer*, 371 F.3d 406, 413 (8th Cir. 2004). So has the leading bankruptcy treatise. *See* 4 Alan N. Resnick, Collier on Bankruptcy ¶ 523.08[2][c] (16th ed. 2017 online) ("Courts are sharply divided on the proper scope of the term."). And, indeed, so has Appling himself. *See* Appling CA11 Reply Br. 10 ("This case requires the Court to wade into an active circuit split."). Certiorari is warranted to resolve that conflict.

The majority position. Three courts of appeals have squarely held that a statement about a specific asset is not a "statement respecting the debtor's . . . financial condition." *See* App. 6a-7a.

The Eighth Circuit led the way in *In re Lauer*, 371 F.3d 406 (2004). The false statement in that case concerned a Missouri limited partnership's purported ownership interest in a nursing home. *Id.* at 409-10. The Eighth Circuit initially acknowledged that lower "[c]ourts ha[d] disagreed" on whether the phrase "respecting the debtor's or an insider's financial condition" in 11 U.S.C. § 523(a)(2) could include "misrepresentations concerning specific assets" like the false statement at issue in that case. *Id.* at 413. Then the Eighth Circuit held it did not. *Id.* at 413-14.

In Section 523(a)(2)(A) and (B), the Eighth Circuit reasoned, Congress had sought to address "'the

peculiar potential of financial statements to be misused . . . by creditors' such as 'consumer finance companies, which sometimes have encouraged [false financial statements] by their borrowers for the very purpose of insulating their own claims from discharge.'" *Id.* at 413 (second alteration in original) (citation omitted). Because the false statement about Crossroads' interest in a specific asset (the nursing home) was not analogous to the "financial statements" "routinely required" by such creditors, the Eighth Circuit held that it was not a statement "respecting [Crossroads'] financial condition," and therefore the debtor's fraud liability was nondischargeable. *Id.* at 413-14.[2]

A year later, the Tenth Circuit considered the issue in *In re Joelson*, 427 F.3d 700 (2005). There, the debtor made false statements about specific real properties in order to secure a $50,000 loan. *Id.* at 703. Like the Eighth Circuit, the Tenth Circuit recognized at the outset that "[c]ases interpreting the phrase 'respecting the debtor's . . . financial condition' have split." *Id.* at 710. Under what the court of appeals called the "strict interpretation," statements "respecting the debtor's . . .

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[2] In *Lauer*, the debtor misrepresented the limited partnership Crossroads' interest in the nursing home, not his own. "The Bankruptcy Code defines 'insider' to include a partnership in which an individual debtor is a general partner." 371 F.3d at 413. Accordingly, the Eighth Circuit considered whether the misrepresentation about Crossroad's interest was a "statement respecting . . . an insider's financial condition," instead of a "debtor's . . . financial condition." *Id.* The court gave no indication that the distinction made any difference to its analysis, and no other court of appeals has distinguished *Lauer* on that basis. *See* App. 6a-7a (including the Eighth Circuit among the courts of appeals to have held that "a statement about a single asset does not respect a *debtor's* financial condition" (emphasis added)).

financial condition" are only those that "present[] an overall picture of the debtor's financial position." *Id.* at 705. By contrast, the court noted, under the "broad interpretation" even a communication "addressing the status of a single asset or liability qualifies." *Id.*

After extensive analysis of the text, structure, and policy of the Bankruptcy Code, *id.* at 706-07; the legislative history of Section 523(a)(2), *id.* at 707-10; and case law from this Court and others interpreting the provision, *id.* at 710-14, the Tenth Circuit agreed with the former interpretation. *Id.* at 714. Accordingly, the court held that statements "respecting the debtor's ... financial condition" are "those that purport to present a picture of the debtor's overall financial health." *Id.* The debtor's false statements concerning only her purported ownership of "certain assets" were not. *Id.* at 714-15.

The Fifth Circuit next addressed the issue in *In re Bandi*, 683 F.3d 671 (2012). The false statements again concerned the debtor's (or, in that case, debtors') purported ownership of certain real properties in order to secure a loan. *Id.* at 673. The Fifth Circuit likewise acknowledged that "there is a split among the various courts as to the correct interpretation of § 523(a)(2)." *Id.* at 677. After carefully examining the text and other indicia of Congress's intent, the Fifth Circuit sided with the Tenth and Eighth Circuits: "We conclude that the phrase 'a statement respecting the debtor's or an insider's financial condition' as used in § 523(a)(2) was meant to embody terms commonly understood in commercial usage rather than a broadly descriptive phrase intended to capture any and all misrepresentations that pertain in some way to specific assets or liabilities of the debtor." *Id.* at 676. As such,

the debtors' false statements about specific properties were not "respecting [their] financial condition," and thus the debt was nondischargeable. *Id.* at 679.[3]

The minority view. Before the Eleventh Circuit's decision in this case, the Fourth Circuit was the only court of appeals to have reached a contrary conclusion, and the Fourth Circuit did so more than three decades ago, in a one-page decision. *See* App. 6a.

In *Engler v. Van Steinburg*, the debtor made a false statement that certain collateral was not subject to a superior lien in order to obtain a loan. 744 F.2d 1060, 1060 (1984). The Fourth Circuit"[c]onceded[]" that "a statement that one's assets are not encumbered is not a formal financial statement." *Id.* at 1060-61. But, it held, Section 523(a)(2)(A) did not "speak in terms of financial statements." *Id.* It referred instead to "a much broader class of statements—those 'respecting the debtor's . . . financial condition.'" *Id.* at 1061. An assertion that one owns a certain property "free and clear," it reasoned, "may be the most significant information about his financial condition." *Id.* And, thus, a debt incurred on that basis could be discharged, unless it met the higher standards for nondischargeability in 11 U.S.C. § 523(a)(2)(B). *Id.* at 1060-61. Because the statement at issue did not meet those standards—namely, it was not made in writing—the court held that it could be discharged. *Id.* at 1060.

As the first court of appeals to address the question, the Fourth Circuit's analysis was brief. Unlike all of the courts of appeals to address the issue since, the Fourth Circuit did not recognize that courts

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[3] As discussed *infra* at 14-15, the debtors petitioned this Court for certiorari in *Baudi*. This Court denied review.

had adopted conflicting interpretations of Section 523(a)(2)(A). The court also failed to consider whether its interpretation was consistent with the purpose of the provision—as reflected in the legislative history and described in *Field*, *see supra* at 3 & n.1—or with the policies behind the Bankruptcy Code as a whole.

For that reason, the last time certiorari was sought on the question presented—in 2012, following the Fifth Circuit's decision in *Bandi*—the respondent argued that the split did not merit review because it was "stale" (given that it was based on 1984 decision), "lopsided" (given that the line up, then, was 3-1), and thin (given that the Fourth Circuit's analysis of the issue was brief). *In re Bandi* Opp. at 5-7, 2012 WL 6019371. The respondent also pointed to the "emerging consensus" among the courts of appeals, and speculated that the Fourth Circuit might eventually revisit the issue and restore uniformity to the law. *Id.* at 7.

Whether or not that was a fair assessment then, it is certainly not now. By acknowledging the conflict among the courts of appeals and siding with the Fourth Circuit in an extensively reasoned (even if ultimately erroneous) published decision, the Eleventh Circuit has eliminated any element of staleness, any realistic chance that the conflict would sort itself out on its own, and any argument that the conflict is not fully vetted, thus necessitating the intervention of this Court to restore uniformity among the circuits on this important issue. The question presented is ripe for review.

B. The Question Presented Is Important And This Case Presents An Excellent Vehicle

The clear and deepening split over the question presented is a compelling, and frequently sufficient,

basis to grant certiorari in itself. But the case for certiorari here is further bolstered by the fact that the question presented is undeniably important—to countless debtors and creditors, and the bankruptcy system alike. It recurs frequently in bankruptcy courts throughout the country. And this case offers a clean vehicle in which to resolve the conflict.

Ensuring the uniformity of federal law is always important, but it is fundamental to the proper administration of the bankruptcy system in particular. The Constitution itself acknowledges as much by granting Congress power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. This Court thus routinely grants certiorari to resolve disagreements between just *two* courts of appeals concerning the interpretation or application of the Bankruptcy Code. *See, e.g.*, *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (certiorari was granted to resolve a 1-1 circuit split); *Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014) (same); *Hall v. United States*, 132 S. Ct. 1882, 1886 & n.1 (2012) (same). Here, the Eleventh Circuit has deepened a circuit conflict that now involves at least *five* circuits. Such disuniformity in the "uniform Laws" of bankruptcy is untenable.

The untenability of allowing this circuit split to stand is underscored by the fact that the question recurs so frequently in the lower courts. In addition to the five circuits that have now issued published opinions addressing the question, at least two others have been presented with it, but resolved the appeals without adopting a definitive answer. *See In re Gulevsky*, 362 F.3d 961, 962 (7th Cir. 2004); *In re Bogdanovich*, 292 F.3d 104, 112 (2d Cir. 2002).

Perhaps more important, as the Eleventh Circuit noted, the question regularly arises in bankruptcy courts around the country, where the answers are similarly inconsistent. *Compare, e.g., In re Feldman*, 500 B.R. 431, 437 (Bankr. E.D. Pa. 2013) (adopting majority position); *In re Banayan*, 468 B.R. 542, 575-76 (Bankr. N.D.N.Y. 2012) (same); *In re Campbell*, 448 B.R. 876, 886 (Bankr. W.D. Pa. 2011) (same),[4] *with In re Carless*, No. 10-42988 (DHS), 2012 WL 32700, at *3-4 (Bankr. D.N.J. Jan. 6, 2012) (adopting the minority position); *In re Aman*, 492 B.R. 550, 565 & n.47 (Bankr. M.D. Fla. 2010) (same); *In re Nicolai*, No. 05-29876, 2007 WL 405851, at *1 (Bankr. D.N.J. Jan. 31, 2007) (same).[5] The citations here represent just the tip of

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[4] *See also In re Alicea*, 230 B.R. 492, 503-04 (Bankr. S.D.N.Y. 1999) (majority position); *In re Soderlund*, 197 B.R. 742, 746 (Bankr. D. Mass. 1996) (same); *In re Peterson*, 182 B.R. 877, 880 (Bankr. N.D. Okla. 1995) (same); *In re Olinger*, 160 B.R. 1004, 1010–11 (Bankr. S.D. Ind. 1993) (same); *In re Oliver*, 145 B.R. 303, 305-06 (Bankr. E.D. Mo. 1992) (same); *In re Mercado*, 144 B.R. 879, 883-85 (Bankr. C.D. Cal. 1992) (same); *In re Sansoucy*, 136 B.R. 20, 23 (Bankr. D.N.H. 1992) (same); *In re Price*, 123 B.R. 42, 45 (Bankr. N.D. Ill. 1991) (same); *In re Seaborne*, 106 B.R. 711, 714 (Bankr. M.D. Fla. 1989) (same); *In re Pollina*, 31 B.R. 975, 977-78 (D.N.J. 1983) (same).

[5] *See also In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005) (minority position); *In re Priestley*, 201 B.R. 875, 882 (Bankr. D. Del. 1996) (same); *In re Kolbfleisch*, 97 B.R. 351, 353 (Bankr. N.D. Ohio 1989) (same); *In re Richey*, 103 B.R. 25, 29 (Bankr. D. Conn. 1989) (same); *In re Rhodes*, 93 B.R. 622, 624 (Bankr. S.D. Ill. 1988) (same); *In re Howard*, 73 B.R. 694, 702 (Bankr. N.D. Ind. 1987) (same); *In re Panaia*, 61 B.R. 959, 960-61 (Bankr. D. Mass. 1986) (same); *In re Prestridge*, 45 B.R. 681, 683 (Bankr. W.D. Tenn. 1985) (same).

the iceberg given that many if not most bankruptcy court rulings on the issue are oral and unreported.

This case presents the ideal vehicle for resolving the conflict. The relevant facts are undisputed (or have been resolved by a finder or fact), and the resolution of the question presented is dispositive of the dischargeability of the debt. After a two-day trial, the bankruptcy court found that every other element of nondischargeability under Section 523(a)(2)(A) was met. App. 62a-66a. Its findings were affirmed by the district court, *see id.* at 30a-44a, and left untouched by the court of appeals, *see id.* at 4a. Appling himself acknowledged that the "case require[d] the court to wade into an active circuit split." Appling CA11 Reply Br. 10. The question presented was raised and passed upon by each court below—the bankruptcy court (App. 70a-76a), district court (*id.* at 24a-30a), and court of appeals (*id.* at 4a-14a). The court of appeals passed upon the question in a published opinion after thorough analysis, and chose a side. There is no impediment to this Court's resolving the question in this case, and therefore no reason to wait to decide this issue.

C. The Decision Below Is Wrong

Finally, the case for certiorari is strengthened by the fact that the court of appeals erred. The court of appeals thought the text of Section 523(a)(2)(A) unambiguously compelled its conclusion, despite the contrary holdings from three courts of appeals and myriad bankruptcy courts. That was error. The text and structure of the statute, as well as the purpose of Section 523(a)(2)(A) and the origins of the "financial condition" exception in particular, weigh decisively against the Eleventh Circuit's conclusion.

Most fundamentally, the Eleventh Circuit's interpretation fails to give effect to the text of Section 523(a)(2)(A). "Financial condition" is different than "finances" generally. When the Bankruptcy Code uses the term "financial condition," it refers to the debtor's financial health generally—*i.e.*, the balance of all of the debtor's assets and liabilities. The Code defines "insolvent"—the lynchpin of the bankruptcy system—as, among other things, the "*financial condition* such that the sum of such entity's debts is greater than all of such entity's property." 11 U.S.C. § 101(32)(A) (emphasis added). This meaning is also consistent with both the ordinary and commercial usage of "financial condition." *See, e.g.*, *Balance sheet*, Webster's Third New International Dictionary 165 (1993) (defining "balance sheet" as a "statement of the *financial condition* (as of a corporation) at a given date showing the equality of total assets to total liabilities plus net worth or of total liabilities to total assets plus deficit" (emphasis added)); *In re Bandi*, 683 F.3d at 676.

Accordingly, before the court of appeals, Appling "accept[ed] the premise that 'financial condition'" in Section 523(a)(2)(A) means "*overall* financial condition." Appling CA11 Br. 16. The court of appeals did the same. *See* App. 8a ("Whether by its ordinary meaning or as a term of art, 'financial condition' likely refers to the sum of all assets and liabilities."); *see id.* at 9a ("statement *of* the debtor's financial condition" would likely include only those statements that "express[] a debtor's overall financial condition").

Instead, the Eleventh Circuit focused on Congress's use of "respecting." In the court of appeals' view, "statement[s] *respecting* the debtor's ... financial condition" must include statements concerning a single

asset because the word "respecting" is "defined broadly as '[w]ith regard or relation to; regarding; concerning.'" App. 8a (quoting *Respecting*, Webster's New International Dictionary 2123 (2d ed. 1961)). That interpretation uses the word "respecting" to effectively override or change the meaning of "financial condition."

Of course, "financial condition" has to be considered in context. And it is no doubt true that "respecting," like the similar "related to" or "in connection with" phrases Congress uses from time to time, has breadth in the abstract. Indeed, this Court has observed that such phrases are "essentially 'indeterminat[e].'" *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (alteration in original) (citation omitted). As such, "one might be excused for wondering, at first blush," when Congress uses them, "whether [its] words of limitation . . . do much limiting" at all. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). But, for that very reason, the Court has cautioned against interpreting such phrases "to extend to the furthest stretch of its indeterminacy." *Id.*

That is precisely what the Eleventh Circuit has done here. While (as discussed) "financial condition" is a phrase of unquestioned limitation, under the Eleventh Circuit's interpretation the exception in Section 523(a)(2)(A) essentially applies to any statement about anything concerning one's finances—a vastly broader class. The court's reading of "respecting" thus renders Congress's use of "financial condition" largely meaningless. If Congress had meant that result, the far more natural way to achieve it would have been to say a "statement respecting the debtor's finances" or the like—not "financial condition."

Moreover, this interpretation was not necessary. A court can give effect to Congress's use of "respecting" without overriding the limitations inherent in Congress's use of "financial condition."

The Eleventh Circuit's interpretation is also irreconcilable with the purpose of Section 523(a)(2)(A) as a whole. Section 523(a)(2)(A) is a prohibition on the discharge of debts incurred by fraudulent means, dating back in one form or another to at least the Bankruptcy Act of 1898. *See Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1585 (2016); *In re Joelson*, 427 F.3d at 707. It gives effect to the fundamental bankruptcy policy that the bankruptcy courts will not provide safe haven for the perpetrators of fraud. As this Court has stressed, the Code seeks to protect the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted).

The "financial condition" exception carves out of that longstanding prohibition debts obtained by a particular kind of fraud, based on "statements respecting the debtor's . . . financial condition." As this Court has repeatedly recognized, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception," the Court's typical practice is "[to] read the exception narrowly in order to preserve the primary operation of the provision." *Knight v. Commissioner*, 552 U.S. 181, 190 (2008) (alterations in original) (citation omitted). The Eleventh Circuit's interpretation, by contrast, undermines the primary operation of Section 523(a)(2)(A) by creating a loophole through which dishonest debtors might relieve themselves, at honest creditors' expense, of liabilities incurred through fraud.

As the Tenth Circuit observed, the minority view of the "financial condition" exception could "eliminate coverage for many misrepresentations" at the very "heart" of Section 523(a)(2)(A), because "'virtually every statement by a debtor that induces the delivery of goods or services on credit relates to his ability to pay.'" *In re Joelson*, 427 F.3d at 710, 713 (citation omitted). Even the most ardent textualists would endeavor to avoid that problematic result. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63-65 (2012) ("A textually permissible interpretation that furthers rather than obstructs a document's purpose should be favored.").

Finally, the Eleventh Circuit's interpretation also fails to account for the genesis of the "financial condition" exception. As this Court recognized in *Field*, Congress added the "financial condition" exception because it was concerned that certain consumer-finance companies were deliberately encouraging their customers to "submit[] false financial statements . . . for the very purpose of insulating [the creditors'] own claims from discharge." 516 U.S. at 76-77. These creditors accomplished this by misleading loan applicants into making inaccurate statements about their "complete list of debts." *Id.* at 77 n.13 (quoting H.R. Rep. No. 95-595 at 130 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6091). Thus, Congress crafted an exception for debts arising from "statement[s] respecting the debtor's financial condition," while heightening the rules for discharging such a debt to protect against the problem it was addressing. *See id.* at 65.

The Eleventh Circuit's decision expands the scope of the "financial condition" exception far beyond the

particular problem targeted by Congress when it amended the provision. Indeed, it turns Congress's intent on its head. If a statement "respecting the debtor's ... financial condition" includes a statement regarding a single asset, then in an effort to protect the honest but unwary debtor from dishonest creditors, Congress has in fact made a huge category of debts incurred by fraud dischargeable in bankruptcy *unless* the honest creditor can meet the heightened standards of Section 523(a)(2)(B), including among others proving that the statement be in writing and that the creditor reasonably (as opposed to justifiably) relied on it.

The Eleventh Circuit erred in concluding that the "financial condition" exception contained in Section 523(a)(2)(A) demands these strange results, much less *unambiguously* demands these results. The flaws in the Eleventh Circuit's interpretation provide all the more reason for this Court to grant review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 11, 2017

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-11911

D.C. Docket Nos. 3:15-cv-00031-CAR;
3:13-bkc-03042-JPS

In re: R. SCOTT APPLING,

Debtor.

R. SCOTT APPLING,

Plaintiff - Appellant,

versus

LAMAR, ARCHER & COFRIN, LLP,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(February 15, 2017)
848 F.3d 953

Opinion

Before WILLIAM PRYOR and ROSENBAUM, Circuit Judges, and MARTINEZ,* District Judge.

WILLIAM PRYOR, Circuit Judge:

This appeal presents a question that has divided the federal courts: Can a statement about a single asset be

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* Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida, sitting by designation.

a "statement respecting the debtor's ... financial condition"? 11 U.S.C. § 523(a)(2). Ordinarily, a debtor cannot discharge any debt incurred by fraud, *id.* § 523(a)(2)(A), but a debtor can discharge a debt incurred by a false statement respecting his financial condition unless that statement is in writing, *id.* § 523(a)(2)(B). R. Scott Appling made false oral statements to his lawyers, Lamar, Archer & Cofrin, LLP, that he expected a large tax refund that he would use to pay his debt to the firm. After Lamar obtained a judgment against Appling for the debt, Appling filed for bankruptcy and Lamar initiated an adversary proceeding to have the debt ruled nondischargeable. The bankruptcy court and the district court ruled that Appling's debt could not be discharged under section 523(a)(2)(A) because it was incurred by fraud. But we disagree. Because Appling's statements about his tax refund "respect[] [his] ... financial condition," *id.* § 523(a)(2)(B)(ii), and were not in writing, *id.* § 523(a)(2)(B), his debt to Lamar can be discharged in bankruptcy. We reverse and remand.

I. BACKGROUND

R. Scott Appling hired the law firm Lamar, Archer & Cofrin, LLP, to represent him in litigation against the former owners of his new business. Appling agreed to pay Lamar on an hourly basis with invoices for fees and costs due monthly. Appling became unable to keep current on the mounting legal bill and as of March 2005, owed Lamar $60,819.97. Lamar threatened to terminate the firm's representation and place an attorney's lien on all work product unless Appling paid the outstanding fees.

Appling and his attorneys held a meeting in March 2005. The bankruptcy court found that during this

meeting Appling stated he was expecting a tax refund of "approximately $100,000," which would be enough to pay current and future fees. Lamar contends that in reliance on this statement, it continued its representation and did not begin collection of its overdue fees.

When Appling and his wife submitted their tax return, they requested a refund of only $60,718 and received a refund of $59,851 in October. The Applings spent this money on their business. They did not pay Lamar.

Appling and his attorneys met again in November 2005. The bankruptcy court found that Appling stated he had not yet received the refund. Lamar contends that in reliance on this statement, it agreed to complete the pending litigation and forego immediate collection of its fees but refused to undertake any additional representation. In March 2006, Lamar sent Appling his final invoice for a principal amount due of $55,303.66 and $6,185.32 in interest.

Five years later, Lamar filed suit against Appling in a superior court in Georgia. In October 2012, Lamar obtained a judgment for $104,179.60. Three months later, the Applings filed for bankruptcy.

Lamar initiated an adversary proceeding against Appling in bankruptcy court. The bankruptcy court ruled that because Appling made fraudulent statements on which Lamar justifiably relied, Appling's debt to Lamar was nondischargeable, 11 U.S.C. § 523(a)(2)(A). The district court affirmed. The district court rejected Appling's argument that his oral statements "respect[ed] . . . [his] financial condition," 11 U.S.C. § 523(a)(2)(B), and should have been dischargeable. The district court ruled that

"statements respecting the debtor's financial condition involve the debtor's net worth, overall financial health, or equation of assets and liabilities. A statement pertaining to a single asset is not a statement of financial condition." The district court agreed with the bankruptcy court that Appling made material false statements with the intent to deceive on which Lamar justifiably relied.

II. STANDARD OF REVIEW

When we sit as the second appellate court to review a bankruptcy case, *In re Glados, Inc.*, 83 F.3d 1360, 1362 (11th Cir. 1996), we "assess the bankruptcy court's judgment anew, employing the same standard of review the district court itself used," *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009). "Thus, we review the bankruptcy court's factual findings for clear error, and its legal conclusions *de novo*." *Id.*

III. DISCUSSION

The Bankruptcy Code gives a debtor a fresh start by permitting him to discharge his pre-existing debts. But there are many exceptions to discharge. And some of those exceptions protect victims of fraud.

Section 523(a)(2) creates two mutually exclusive exceptions to discharge:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

> (A) false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition*;
>
> (B) use of a *statement in writing*—
>
> (i) that is materially false;
>
> (ii) *respecting the debtor's or an insider's financial condition*;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive; . . .

11 U.S.C. § 523(a)(2) (emphasis added).

The Code treats debts incurred by a statement "respecting the debtor's ... financial condition" differently from other debts. *Id.* All fraud "other than a statement respecting the debtor's ... financial condition" is covered by subsection (A). *Id.* § 523(a)(2)(A). Under subsection (A), a debtor cannot discharge a debt obtained by any type of fraudulent statement, oral or written. *Id.* A creditor also need prove only justifiable reliance. *Field v. Mans*, 516 U.S. 59, 61 (1995). But if a statement is made "respecting the debtor's . . . financial condition," then subsection (B) governs. 11 U.S.C. § 523(a)(2)(B)(ii). To avoid discharge of a debt induced by a statement respecting the debtor's financial condition, a creditor must show reasonable reliance and that the statement was intentional, materially false, and in writing. *Id.* § 523(a)(2)(B). Thus, a debt incurred by an oral, fraudulent statement respecting the debtor's financial condition can be discharged in bankruptcy.

We must determine whether Appling's statements about a single asset are "statement[s] respecting [his] ... financial condition." *Id.* § 523(a)(2). The bankruptcy court found that Appling made false oral statements about his anticipated tax refund to receive an extension of credit from Lamar. If these statements *do not* respect his financial condition, Appling can discharge his debt to Lamar in bankruptcy only if he disproves an element of fraud. *Id.* § 523(a)(2)(A). But if the statements *do* respect his financial condition, Appling can discharge his debt to Lamar because the statements were not in writing. *Id.* § 523(a)(2)(B).

The circuits and other federal courts are split on this question. The Fourth Circuit has held that a "debtor's assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition." *Engler v. Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984). Several bankruptcy courts—including one in this Circuit, *In re Aman*, 492 B.R. 550, 565 & n.47 (Bankr. M.D. Fla. 2010)—have agreed. *See, e.g.*, *In re Carless*, No. 10–42988, slip op. at *3–4 (Bankr. D.N.J. Jan. 6, 2012); *In re Nicolai*, No. 05–29876, slip op. at *1 (Bankr. D.N.J. Jan. 31, 2007); *In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005); *In re Priestley*, 201 B.R. 875, 882 (Bankr. D. Del. 1996); *In re Kolbfleisch*, 97 B.R. 351, 353 (Bankr. N.D. Ohio 1989); *Matter of Richey*, 103 B.R. 25, 29 (Bankr. D. Conn. 1989); *In re Rhodes*, 93 B.R. 622, 624 (Bankr. S.D. Ill. 1988); *In re Howard*, 73 B.R. 694, 702 (Bankr. N.D. Ind. 1987); *In re Panaia*, 61 B.R. 959, 960–61 (Bankr. D. Mass. 1986); *In re Roeder*, 61 B.R. 179, 181 n.1 (Bankr. W.D. Ky. 1986); *In re Prestridge*, 45 B.R. 681, 683 (Bankr. W.D. Tenn. 1985). But the Fifth, Eighth, and Tenth Circuits have held that a statement

about a single asset does not respect a debtor's financial condition because it "says nothing about the overall financial condition of the person making the representation or the ability to repay debt." *In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012); *see also In re Lauer*, 371 F.3d 406, 413–14 (8th Cir. 2004); *In re Joelson*, 427 F.3d 700, 706 (10th Cir. 2005). And some bankruptcy courts in other circuits have agreed. *See, e.g.*, *In re Feldman*, 500 B.R. 431, 437 (Bankr. E.D. Penn. 2013); *In re Banayan*, 468 B.R. 542, 575–76 (Bankr. N.D.N.Y. 2012); *In re Campbell*, 448 B.R. 876, 886 (Bankr. W.D. Penn. 2011).

"[I]nterpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989)). Because the Code does not define the relevant terms, we look to "their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012); *see also In re Piazza*, 719 F.3d 1253, 1261 (11th Cir. 2013) (applying this canon to the Bankruptcy Code). The text and context establish that a statement about a single asset can be a "statement respecting the debtor's ... financial condition." 11 U.S.C. § 523(a)(2).

"Financial condition" likely means one's overall financial status. Elsewhere in the statute, the Bankruptcy Code defines "insolvent" as the "financial condition such that the sum of such entity's debts is greater than all of such entity's property." *Id.* § 101(32)(A). In this context, the statute uses "financial condition" to describe the overall state of being

insolvent, not any particular asset on its own. Because "[a] word or phrase is presumed to bear the same meaning throughout a text," Scalia & Garner, *supra*, at 170, we should interpret "financial condition" in section 523(a)(2) in the same way. Whether by its ordinary meaning or as a term of art, "financial condition" likely refers to the sum of all assets and liabilities.

But even if "financial condition" means the sum of all assets and liabilities, it does not follow that the phrase "statement *respecting* the debtor's . . . financial condition," *Id.* § 523(a)(2) (emphasis added), covers only statements that encompass the entirety of a debtor's financial condition at once. Read in context, the phrase "statement *respecting* the debtor's . . . financial condition," *id.*, includes a statement about a single asset. We must not read the word "respecting" out of the statute. *See* Scalia & Garner, *supra*, at 174 ("If possible, every word . . . is to be given effect.").

"Respecting" is defined broadly as "[w]ith regard or relation to; regarding; concerning." *Respecting*, *Webster's New International Dictionary* 2123 (2d ed. 1961); *see also Respecting*, *Oxford English Dictionary* (online ed.) ("With respect to; with reference to; as regards."). For example, documents can "relate to" or "concern" someone's health without describing their entire medical history. Articles can "reference" the Constitution without quoting its entire text. Likewise, a statement can "respect" a debtor's "financial condition" without describing the overall financial situation of the debtor. The Supreme Court has interpreted "with respect to" in a statute to mean "direct relation to, or impact on." *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 506 (1992). And the Court has interpreted "respecting" in the First Amendment

to include any partial step toward the establishment of religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A statement about a single asset "relates to" or "impacts" a debtor's overall financial condition. And knowledge of one asset or liability is a partial step toward knowing whether the debtor is solvent or insolvent.

If the statute applied only to statements that expressed a debtor's overall financial condition, Congress could have said so. Lamar argues that "the preposition 'respecting' has no magic, expansive effect in the statute, it is simply a required grammatical device necessary to connect two related terms." Perhaps this argument would have more sway if the statute said "statement *of* the debtor's financial condition." But Congress did not use this language. Congress also did not say "statement indicating" or "revealing" or "disclosing" or "encompassing" the debtor's financial condition, phrases that would connote a full or complete expression of financial condition.

Lamar dismisses the focus on the word "respecting" as "nothing more than a game of semantics," but judges have a responsibility to interpret the whole text. And "[s]ometimes the canon [of ordinary meaning] governs the interpretation of so simple a word as a preposition." Scalia & Garner, *supra*, at 71. A statement about a single asset is still a statement *respecting* a debtor's financial condition.

Lamar argues that because the legislative history often used "financial statement" in place of "statement respecting the debtor's ... financial condition," 11 U.S.C. § 523(a)(2), we should read the statute to apply only to financial statements, but the word "statement" should also be given its ordinary meaning. Mere

proximity of "statement" to "financial condition" is not enough to limit the meaning of the text. "Statement" is defined as "[t]hat which is stated; an embodiment in words of facts or opinions; a narrative; recital; report; account." *Statement*, *Webster's New International Dictionary* 2461 (2d ed. 1961). The definition of financial statement is technical and would exclude a statement about a single asset: "A balance sheet, income statement, or annual report that summarizes an individual's or organization's financial condition on a specified date or for a specified period by reporting assets and liabilities." *Financial Statement*, *Black's Law Dictionary* (10th ed. 2014). Setting aside the problems with legislative history, Lamar's argument works against it. Precisely because "[t]he term 'financial statement' has a strict, established meaning," *Joelson*, 427 F.3d at 709, we should expect the statute to say "financial statement" if it conveys that meaning. But the statute instead says "statement." To limit the definition to only "financial statements," Congress need only say so. *Cf.* 11 U.S.C. § 1125 (using the term "disclosure statement"); *Id.* § 101(49)(A)(xii) ("registration statement").

The surplusage cannon supports our determination that "statement" should be given its ordinary meaning. "If possible, every word and every provision is to be given effect.... None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Scalia & Garner, *supra*, at 174; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). In subsection (B), the statute says "use of a statement in writing." 11 U.S.C. § 523(a)(2)(B). Because a formal financial statement is almost always a written document (it is hard to imagine

an oral recitation of all assets and liabilities), reading the statute to cover only financial statements would render the writing requirement surplusage.

And in the context of a statute about fraud, the ordinary meaning of the word "statement" makes sense. Section 523(a)(2) creates two similar exceptions to discharge for debts incurred by fraud. Subsection (A) references specific common-law torts. *See Field*, 516 U.S. at 69 ("'[F]alse pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. . . . [T]hey imply elements that the common law has defined them to include." (quoting 11 U.S.C. § 523(a)(2)(A))). Subsection (B) enumerates its own elements which are analogous, but not identical to the common law elements. For example, where the common law requires justifiable reliance, section 523(a)(2)(B)(iii) requires reasonable reliance. *Field*, 516 U.S. at 72–75. Similarly, where the common law requires either an affirmative representation or an intentional omission, section 523(a)(2)(B) requires a "statement," as opposed to an omission. True, if Congress wanted to exclude omissions from subsection (B), it could have used the term "representation" and avoided the confusion with the term "financial statement." But Congress would not have said "false representation" without implying the common law term of art. *See Field*, 516 U.S. at 69. Accordingly, "statement" means an expression or embodiment in words, as opposed to a nonactionable omission.

Lamar also argues that the "only way to give Section 523(a)(2)(A) meaning is to interpret it to provide a distinction between oral and written representations," but this argument reveals a fundamental misunderstanding of the statute. Section

523(a)(2)(A) covers most fraud. But section 523(a)(2)(B) covers statements respecting financial conditions. Lamar states that "certain oral misrepresentations must be non-dischargeable." They are. Any debt incurred by an oral misrepresentation that is not "respecting the debtor's financial condition" is nondischargeable under subsection (A). Appling provides a list of examples, including false representations about job qualifications and lies about the purpose and recipient of a payment. The question is how broadly to define the phrase "statement respecting the debtor's ... financial condition," not whether allowing discharge of debts incurred by oral misrepresentations about finances is a good idea. The statute allows the discharge of debts incurred by oral statements so long as they "respect" the debtor's "financial condition." Lamar's argument is based on policy, not statutory structure.

When the language of the statute is clear, we need not look any further. *See Puerto Rico v. Franklin Cal. Tax–Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (When "the statute's language is plain," "that is also where the inquiry should end." (internal quotations omitted)); *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932) ("[W]e have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."). A distaste for dishonest debtors does not empower judges to disregard the text of the statute. Because the text is not ambiguous, we hold that "statement[s] respecting the debtor's ... financial condition" may include a statement about a single asset.

This result is also perfectly sensible. The requirement that some statements be made in writing promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose. Lamar refers to our interpretation as a "giant fraud loophole." But the requirement of a writing is not at all unusual in the history of the law. From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief. This requirement may seem harsh after the fact, especially in the case of fraud, but it gives creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision. In the context of a debt incurred by fraud, a lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit. Lamar, a law firm, could have required Appling to put his promise to spend his tax return on their legal fees in writing before continuing to represent him.

This rule strikes a reasonable balance between the "'conflicting interests' of discouraging fraud and of providing the honest but unfortunate debtor a fresh start." *In re Vann*, 67 F.3d 277, 284 (11th Cir. 1995) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)). The code does not unfairly reward dishonest debtors, but instead imposes different requirements of proof for different kinds of statements. A statement respecting a debtor's financial condition must be in writing, which helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty. And providing an incentive for creditors to receive statements in writing may reduce the incidence of

fraud. Because a statement about a single asset can be a "statement respecting the debtor's ... financial condition," and because Appling's statements were not in writing, his debt can be discharged under section 523(a)(2)(B).

IV. CONCLUSION

We **REVERSE** the order ruling that Appling's debt to Lamar is nondischargeable and **REMAND** for further proceedings consistent with this opinion.

ROSENBAUM, Circuit Judge, concurring:

Sometimes things are not as they seem. Today we conclude that the phrase "statement respecting ... the debtor's financial condition" in 11 U.S.C. § 523(a)(2) warrants a broad reading. As a result, Appling, the debtor in this case, will receive a discharge of the debt he incurred by lying about how he would pay for the legal services he dishonestly obtained. That certainly seems to frustrate a "primary purpose" of the Bankruptcy Act to provide relief to only the "honest debtor." *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (citation and internal quotation marks omitted).

But in actuality, the broad reading we give to the phrase "statement respecting ... the debtor's financial condition" better promotes congressional intent to give a fresh start to only the "honest debtor" than does a narrow construction of the same phrase. This is so because the very same phrase appears in both §§ 523(a)(2)(A) and (B), and it must have the same meaning in both subsections. Though a narrow construction of the phrase in subsection (A) seems to further congressional intent to protect only the "honest debtor," a broad interpretation of the phrase in

subsection (B) better comports with congressional intent. And the reality is that a broad construction of the phrase "statement respecting ... the debtor's financial condition" in subsection (B) advances congressional intent to provide relief for only the "honest debtor" more than a narrow interpretation of the same phrase in subsection (A).

Because the words of the phrase alone are ambiguous, we must construe the phrase with an eye towards congressional intent in enacting the Bankruptcy Act. When we do that, it is clear that "statement respecting ... the debtor's financial condition" must have the broad meaning that the panel attributes to it.

I.

There's no getting around it. Standing alone, the words of the phrase "statement respecting ... the debtor's financial condition" are not unambiguous. True, the panel seems to think they are and argues that the words clearly mean any statement about any finance, asset, or liability that the debtor may have. But other courts have concluded that the language "statement respecting ... the debtor's financial condition" refers to only statements about a debtor's overall financial circumstances—which do not include statements about only a single asset or liability.

Among the courts that appear to have understood the phrase to mean the opposite of what we conclude today is the Supreme Court, though the Supreme Court has not expressly addressed the meaning of the language. In *Field v. Mans*, 516 U.S. 59 (1995), the Court held that a creditor need show only justifiable reliance on a fraudulent misrepresentation in order to except the debt incurred as a result of that reliance,

from discharge under § 523(a)(2)(A). In reaching this conclusion, the Supreme Court discussed § 523(a)(2)(A) and (B)'s references to "a statement respecting the debtor's ... financial condition" and conveyed its understanding that the words "financial condition" in § 523(a)(2) are a prohibition on excepting from discharge under both subsections (A) and (B) "debts traceable to ... a materially false *financial statement*," *id.* at 64 (emphasis added), apparently meaning "financial statement" as a term of art referring to a statement of net worth, not a statement about a single asset or liability. So at least at the time it decided *Field*, the Supreme Court appeared to have a different understanding of the phrase "a statement respecting the debtor's ... financial condition" than we embrace today.

To be sure, I do not suggest that *Field*'s discussion of the meaning of "a statement respecting the debtor's ... financial condition" purports to instruct courts on the proper meaning of § 523(a)(2)(A). But the Supreme Court's understanding as conveyed in *Field* demonstrates that the language of the phrase is fairly susceptible of more than one meaning.

Three other circuits have likewise concluded that the phrase "a statement respecting the debtor's ... financial condition" must be construed narrowly, to refer to only those statements about a debtor's overall net worth—though they do not appear to have determined the language of the phrase to have an unambiguous meaning. *See, e.g., In re Bandi*, 683 F.3d 671 (5th Cir. 2012); *In re Lauer*, 371 F.3d 406 (8th Cir. 2004); *In re Joelson*, 427 F.3d 700 (10th Cir. 2005).

But while the language itself of the phrase in question may not be unambiguous, that doesn't mean

that § 523(a)(2) is ambiguous in the overall statutory scheme. When we construe a statute, we must do so not only by looking to the language itself, but also by reference to "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 125 S. Ct. 1074, 1081-82 (2015) (citation and quotation marks omitted). And when we do that, it is clear that we must give the phrase "a statement respecting the debtor's . . . financial condition" a broad construction.

The Supreme Court has repeatedly emphasized that the Bankruptcy Code "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (quoting *Hunt*, 292 U.S. at 244). For this reason, only honest debtors receive the benefit of the general policy that exceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor. *In re St. Laurent*, 991 F.2d 672, 680 (11th Cir. 1991). Indeed, we have said that "the malefic debtor may not hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct." *Id.* at 680-81.

So to the extent that the language "statement respecting . . . the debtor's financial condition" is fairly and reasonably susceptible of a construction that better furthers congressional intent to protect only the honest debtor, we are obliged to apply that interpretation. When it comes to § 523(a)(2), a broad construction is reasonable and better accomplishes this purpose than a narrow one.

As the panel notes, the phrase "statement respecting . . . the debtor's financial condition" appears in both subsections (A) and (B). We therefore presume

it to have the same meaning in both subsections. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("[W]e cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute.").

But though the words have the same meaning in both subsections (A) and (B), they have opposite effects on whether a debtor may discharge a debt for something obtained through the use of a "statement respecting . . . the debtor's financial condition." Under subsection (A), which refers to oral statements, if a statement falls within the meaning of "statement respecting . . . the debtor's financial condition," the debt incurred as a result of that statement is dischargeable. Meanwhile, under subsection (B), which refers to written statements, if a statement comes within the meaning of "statement respecting . . . the debtor's financial condition," the debt incurred as a result of that statement is not dischargeable, provided that the other conditions in subsection (B) are satisfied.

So if the phrase has a broad meaning, more false oral statements will have the effect of exempting a debt incurred as the result of a misrepresentation, from the exception to discharge (meaning that such debts will be discharged), than if we construe the phrase narrowly. But fewer false written statements will result in excusing a debt for a fraudulently obtained asset, service, or loan. And since it seems likely that, at least in arm's length transactions, most significant debts are obtained as the result of written representations about finances, as opposed to oral ones, a broader interpretation of the phrase is less likely to benefit dishonest debtors than a narrow construction of it.

II.

For these reasons, I agree with the panel that we must construe the phrase "statement respecting . . . the debtor's financial condition" broadly. To be sure, doing so has the effect of allowing Appling's debt for legal services, which the bankruptcy court concluded he obtained by lying to Lamar about the tax refund, to be discharged. But in the overall statutory scheme, the broad interpretation better promotes Congress's concern to provide relief to "honest debtors" only.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

R. SCOTT APPLING,	:	
Appellant,	:	
v.	:	3:15-CV-031 (CAR)
LAMAR, ARCHER & COFRIN, LLP,	:	
Appellee.	:	
	:	

ORDER ON APPEAL

Before the Court is an appeal from the decision of the United States Bankruptcy Court for the Middle District of Georgia, Athens Division. On appeal, Appellant-Debtor R. Scott Appling contends the Bankruptcy Court erred in concluding that the $104,179.60 owed to Appellant Lamar, Archer & Cofrin, LLP, is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(2)(A). This Court has considered the record, the briefs filed by both parties, and the relevant case law. For the reasons discussed below, the decision of the Bankruptcy Court is hereby AFFIRMED.

LEGAL STANDARD

The Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a). In reviewing the decision of a bankruptcy court, a district court functions as an appellate court.[1] The Court must accept the Bankruptcy Court's findings of fact, unless

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[1] *See Williams v. EMC Mortg. Corp. (In re Williams)*, 216 F.3d 1295, 1296 (11th Cir. 2000) (per curiam).

those facts are clearly erroneous.[2] The Court may not make independent factual findings.[3] Conclusions of law, however, including the Bankruptcy Court's interpretation and application of the United States Bankruptcy Code, are reviewed *de novo*.[4] Thus, this Court owes no deference to the Bankruptcy Court's interpretation of the law or its application of the law to the facts.[5]

BACKGROUND

In 2004, Appellant Appling purchased a business that manufactured seating components. Appellant subsequently learned he had been defrauded in the purchase based on a misrepresentation of the business's financial condition. He hired Appellee Lamar, Archer & Cofrin, LLP to represent him as counsel. They worked for Appellant on an hourly basis with fees due monthly. Appellant also hired Walter Gordon as local counsel. Representing Appellant, Appellee filed suit against the seller and broker of the business in the Superior Court of Franklin County, Georgia.

By March 16, 2005, Appellant owed Appellee $60,819.97 in unpaid legal fees. Additionally, he owed Gordon around $18,000 in legal fees. Appellant emailed Appellee complaining about the status and expenses of

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2 *Id.*

3 *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1384 (11th Cir. 1990).

4 *See Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593 (11th Cir. 1990).

5 *Goerg v. Parungao (In re Goerg)*, 930 F.2d 1563, 1566 (11th Cir. 1991).

the litigation. In response, partner Robert Lamar notified Appellant that failure to bring fees current would cause Appellee to terminate its representation and place an attorney's lien on Appellant's file.[6]

On March 18, Appellant, Appellee, and Gordon met in Gordon's office. Appellee contends at the meeting Appellant stated his accountant, Mike Strickland, had completed his amended tax return, and Appellant would receive a tax refund of $104,000 to $105,000. Because this amount would be sufficient to bring the account current and pay future fees, and because Appellant stated he would use the money for this purpose, Appellee agreed to continue the representation.[7] At trial, the Bankruptcy Court found Appellant did not represent at the March meeting that his accountant had already prepared the tax return. However, the Bankruptcy court did find Appellant represented that he would receive a tax refund of approximately $100,000.

On June 15, Appellant and his wife signed the amended tax return for the year 2002; however, this return only requested a refund of $60,718. On October 6, the I.R.S. informed Appellant he and his wife would receive a refund of $59,851. Within two weeks of receiving the letter from the I.R.S., Appellant and his wife obtained a refund of $59,851. However, Appellant did not use the refund to pay his attorneys.

On November 2, 2005, Appellant and his wife met Appellee in its office for the second time to discuss the unpaid legal fees and status of Appellee's

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6 [Doc. 3] at 43.

7 *Id.* at 17.

representation. Appellant contends he informed Appellee he planned to use the tax refund to keep his floundering business afloat instead of paying Appellee. However, the Bankruptcy Court found Appellant represented to Appellee he had not yet received his refund, and he would use his refund to pay the outstanding legal fees.[8]

In June 2006, a few months after the underlying litigation settled, Appellee learned Appellant had received the refund and used it to prop up his business, not to pay Appellee. In a letter dated June 26, Appellee demanded payment of the outstanding legal fees within fourteen days. On July 19, Appellant responded that after the November 2 meeting, his bankruptcy attorney suggested using the tax refund to help his business instead of paying Appellee, and told Appellee, "[i]t should be obvious as to what I chose to do since we are still open."[9]

In October 2012, after not receiving payment, Appellee sued Appellant in the Superior Court of Hart County, Georgia, and obtained a judgment for $104,179.60. In January 2013, Appellant and his wife filed a petition under Chapter 7 of the Bankruptcy Code. In an adversary proceeding, Appellee sought to have its claim against Appellant rendered nondischargeable under 11 U.S.C. § 523(a)(2)(A). The Bankruptcy Court concluded on March 10, 2015 that Appellant's debt is nondischargeable, and this appeal followed.

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8 *Id.* at 68-69; *see also* [Doc. 1-2] at 14.

9 [Doc. 3] at 73.

ISSUES ON APPEAL

A. Whether the Bankruptcy Court erred in ruling Appellant's alleged representation was not an "oral statement respecting the debtor's financial condition" under 11 U.S.C. § 523(a)(2)(A).

B. Whether the Bankruptcy Court erred in determining Appellee has a nondischargeable claim against Appellant.

C. Whether the Bankruptcy Court erred in failing to apply the heightened standards required under 11 U.S.C. § 523(a)(2)(A) and relevant case law for statements concerning future acts and omissions.

D. Whether the Bankruptcy Court erred in determining Appellee proved reliance, much less justifiable reliance, on any representation of Appellant.

E. Whether the Bankruptcy Court erred in determining damages as being the whole amount of Appellee's claim rather than measuring damages based on the alleged misrepresentation itself.

DISCUSSION

I. Statement Respecting Debtor's Financial Condition

Chapter 7 of the Bankruptcy Code provides for the discharge of certain debts incurred by a debtor, allowing the debtor to obtain a fresh start.[10] However, there are exceptions to discharge, some of which are intended to protect victims of fraud.[11] This appeal's

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[10] *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671, 674 (2012) (citing 11 U.S.C. § 727).

[11] *Id.* (citing 11 U.S.C. § 523).

threshold issue centers around the Bankruptcy Court's interpretation of one of those exceptions, 11 U.S.C. § 523(a)(2)(A).[12]

Pursuant to § 523(a)(2)(A), a debt "for money, property, services, or an extension, renewal, or refinancing of credit" is nondischargeable "to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Additionally, a false oral statement is sufficient to render a debt nondischargeable under § 523(a)(2)(A).[13] Therefore, under § 523(a)(2)(A), for a false oral statement to be nondischargeable it must not be a statement "respecting the debtor's ... financial condition."[14]

Courts disagree whether to construe the phrase "respecting the debtor's ... financial condition" broadly or strictly.[15] According to the broad interpretation, "any communication that has a bearing on the debtor's

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[12] The sister exception to §523 (a)(2)(A) is § 523(a)(2)(B), which covers a debtor's false "written statement" of her financial condition. *See Generac Power Systems, Inc., v. William A. Dato (In re Dato)*, 410 B.R. 106, 110 (Bankr. S.D. Fla. 2009).

[13] *Ershowsky v. Freedman (In re Freedman)*, 427 F. App'x. 813, 818 (11th Cir. 2011) (per curiam). *See also Butler v. Roberts (In re Roberts)*, 54 B.R. 765, 770 (Bankr. D. N.D. 1985) (noting that subsection "(a)(2)(A) includes any acts or statements including those made orally but *excludes* oral statements respecting the debtor's financial condition") (emphasis in original).

[14] *See Supra* note 13.

[15] *Prim Capital Corp. v. May (In re May)*, 368 B.R. 85, 2007 WL 2052185, at *6 (6th Cir. BAP July 19, 2007) (unpublished decision).

financial position," even if it only pertains to a single asset, qualifies as a statement respecting the debtor's financial condition.[16] Under this interpretation, statements involving "conditions to purchase of an asset, ownership of particular property, indebtedness to a creditor and encumbrances on assets" qualify as statements respecting the debtor's financial condition.[17] In contrast, the strict interpretation limits a statement respecting the debtor's financial condition to "financial-type statements including balance sheets, income statements, statements of changes in financial position, or income and debt statements that provide what may be described as the debtor['s] . . . net worth, overall financial health, or equation of assets and liabilities."[18]

This case turns on whether the Bankruptcy Court properly interpreted the phrase "a statement respecting a debtor's financial condition." Although historically a majority of courts followed the broad interpretation,[19] in recent years, the majority of courts have adopted the strict interpretation.[20] The Eleventh

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16 *Id.*

17 *Skull Valley Band of Goshute Indians v. Chivers (In re Chivers)*, 275 B.R. 606, 614 (Bankr. D. Ut. 2002).

18 *Id.* at 615.

19 *Id.* at 615. *See also Engler v. Van Steinburg (In re Steinburg)*, 744 F.2d 1060 (4th Cir. 1984); *Conn. Nat'l Bank v. Panaia (In re Panaia)*, 61 B.R. 959 (Bankr. D. Mass. 1986); *King v. Prestridge (In re Prestridge)*, 45 B.R. 681 (Bankr. W.D. Tenn. 1985).

20 *In re Chivers*, 275 B.R. at 615. *See also Jokay Co. v. Mercado (In re Mercado)*, 144 B.R. 879, 881-86 (Bankr. C.D. Cal. 1992); *Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 503 (Bankr.

Circuit, however, has yet to address this issue. Although the Fourth Circuit[21] follows the broad interpretation, the Fifth,[22] Eighth,[23] and Ten Circuits[24] have adopted the strict interpretation. Finding the reasoning of the Fifth Circuit persuasive, this Court finds that the Bankruptcy Court rightly adopted the strict interpretation of § 523(a)(2)(A).[25]

S.D. N.Y. 1999) (holding that "[t]he arguments supporting the strict view are more persuasive" because "[t]hey are consistent with ordinary usage and faithful to the intent of Congress as reflected in the statements of the sponsors" and "better reflect[] the limited purpose that subdivision (B) was intended to serve"); *Gehlhausen et al. v. Olinger (In re Olinger)*, 160 B.R. 1004, 1009 (Bankr. S.D. Ind. 1993) (holding that "[t]he ordinary usage of 'statement' in connection with 'financial condition' denotes either a representation of a person's overall 'net worth' or a person's overall ability to generate income"); *Bal-Ross Grocers, Inc., v. Sansoucy (In re Sanscoucy)*; 136 B.R. 20, 23 (Bankr. D. N.H. 1992) (holding that "financial condition" refers to "a balance sheet and/or profit and loss statement or other accounting of an entity's overall financial health and not a mere statement as to a single asset or liability").

21 *In re Van Steinburg*, 744 F.2d at 1060-61.

22 *In re Bandi*, 683 F.3d at 676 (holding that "financial condition" means "the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities").

23 *Rose v. Lauer (In re Lauer)*, 371 F.3d 406, 413 (8th Cir. 2004). Although the Eighth Circuit did not explicitly endorse the strict interpretation, the Fifth Circuit notes that the Eighth Circuit's reasoning is consistent with the strict interpretation.

24 *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 706-07 (10th Cir. 2005).

25 *Lamar, Archer & Cofrin v. Appling (In re Appling)*, 500 B.R. 246, 251 (Bankr. M.D. Ga. 2013).

As the Fifth Circuit has noted, other provisions of the Bankruptcy Code to construe the phrase "financial condition" "to connote the overall net worth of an entity or individual."[26] Indeed, the Supreme Court has interpreted a statement of financial condition as equivalent to a statement about the debtor's "bank balance."[27] Other courts, like the fifth Circuit, have adopted the strict interpretation of "financial condition" and argue that it better comports with normal commercial usage,[28] the Bankruptcy Code's legislative history,[29] a harmonious reading of the Code,[30] and the purpose of § 523(a)(2)(B).[31] This Court

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26 *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671, 676-77 (5th Cir. 2012) (citing 11 U.S.C. § 101(32)(A)-(C)).

27 *Id.* at 675 n.16 (quoting *Field v. Mans*, 516 U.S. 59, 76 (1995)). In *Field*, the Court repeatedly refers to "false financial statements," undermining the argument that Congress had not intended to limit § 523(a)(2)(B) to false financial statements, which previously had been "the strongest argument in favor of the broad interpretation." *In re Chivers*, 275 B.R. at 615 (citing *Field*, 516 U.S. at 76-77).

28 *Chivers*, 275 B.R. at 614-16 (quoting *Mercado*, 144 B.R. at 885) (noting the argument that "the normal commercial meaning and usage" of a statement of financial condition indicates either a representation of net worth or overall ability to generate income).

29 *Id.* at 615 (citing *In re Alicea*, 230 B.R. at 501-05 (noting the argument that the legislative history refers to "false financial statement[s]").

30 *Id.* (citing *In re Sansoucy*, 136 B.R. at 23) (noting the argument that "narrowing the definition of financial condition in § 523(a)(2)(B) necessarily expands those statements, both written and oral, that do not relate to financial condition that fall within § 523(a)(2)(A) and better harmonizes the statute").

concurs. Accordingly, statements respecting the debtor's financial condition involve the debtor's net worth, overall financial health, or equation of assets and liabilities. A statement pertaining to a single asset is not a statement of financial condition.

On appeal, Appellant argues this Court should follow the broad interpretation in accordance with *Bancorpsouth Bank v. Callaway* (*In re Callaway*)[32] and *Baker v. Sharpe* (*In re Sharpe*).[33] However, even the court in Callaway acknowledged that "a strict approach is preferable to an overly broad approach" to the meaning of the term "financial condition."[34] More importantly, the court in *Callaway* relied on the Bankruptcy Appellate Panel's holding in *Cadwell v. Joelson* (*In re Joelson*),[35] which the Tenth Circuit later reversed.[36] Likewise, the Fifth Circuit's decision in

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[31] *Id.* (citing *Field*, 516 U.S. at 76-77) (noting the argument that Congress designed § 523(a)(2)(B) to protect debtors from abusive lending practices). The Supreme Court's "recitation of the history of § 523(a)(2)(B) and its goal of preventing abuse by consumer finance companies . . . lends strong support for adoption of the strict interpretation." *Id.*

[32] 2006 WL 6589022 (Bankr. N.D. Ga. Nov. 28, 2006).

[33] B.R. 409 (Bankr. N.D. Tex. 2006).

[34] *Callaway*, 2006 WL 6589022, at *21.

[35] 307 B.R. 689 (10th Cir. 2004).

[36] *In re Joelson*, 427 F.3d at 715 (holding that "a statement about one of [the debtor's] assets is not a statement" that respects the debtor's financial condition and that "a statement about one part of [the debtor's] income flow . . . does not reflect [the debtor's] overall financial health" and, therefore, does not respect the debtor's financial condition).

Bandi v. Becnel (*In re Bandi*)[37] abrogated the holding of *Sharpe* on this issue.[38] Therefore, the Court finds neither case persuasive.

In the present case, the alleged misrepresentations consisted of two oral statements by Appellant. Therefore, to establish the debt's nondischargeability, Appellee needed to show that Appellant's statements did not involve Appellant's financial condition. Here, the Bankruptcy Court took the strict approach to the phrase "respecting the debtor's . . . financial condition," and found Appellant's statements about his tax refund involved a single asset rather than Appellant's net worth, overall financial health, or equation of assets and liabilities, therefore, making it subject to § 523(a)(2)(A).[39] Because the statements did not concern Appellant's financial condition, this Court finds the Bankruptcy Court did not err in holding Appellee stated a claim under § 523(a)(2)(A).

II. Nondischargeability

Under § 523(a)(2)(A), a debtor who makes a false statement not involving financial condition does not receive a discharge "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud . . . ."[40] To establish an exception to discharge under this section, the creditor must show that "the debtor made a false statement with the purpose and intention of deceiving the

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37 *In re Bandi*, 683 F.3d at 676.

38 *Id.*

39 *In re Appling*, 500 B.R. at 251.

40 11 U.S.C. § 523(a)(2)(A).

creditor; the creditor relied on such false statement; the creditor's reliance on the false statement was justifiably founded; and the creditor sustained damage as a result of the false statement."[41] An objecting creditor must prove each element by a preponderance of the evidence.[42] However, the "courts generally construe the statutory exceptions to discharge liberally in favor of the debtor."'[43]

A. False Statement with Intent to Deceive

To establish the first element of § 523(a)(2)(A), the creditor must show "that the debtor made a 'false representation' ... with the intent to deceive the creditor."[44] The debtor's "statement of intent to perform an act in the future will not generally form the basis of a false representation that is actionable under section 523(a)(2)(A) unless the creditor can establish that the debtor lacked the subject intent to perform the act at the time the statement was made."[45] Accordingly, the finder of fact must determine whether the debtor "in good faith ... intended to keep his promise."[46] While an honest but unreasonable belief in

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41 *Johannessen et al. v. Johannessen* (*In re Johannessen*), 76 F.3d 347, 350 (11th Cir. 1996).

42 *Equitable Bank v. Miller* (*In re Miller*), 39 F.3d 301, 304 (11th Cir. 1994) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)).

43 *Id.* (citing *Boroff v. Tully* (*In re Tully*), 818 F.2d 106, 110 (1st Cir. 1987)).

44 *Duncan v. Bucciarelli* (*In re Bucciarelli*), 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010).

45 *Id.* (citing *Allison v. Roberts* (*In re Allison*), 960 F.2d 481 (5th Cir. 1992)).

46 *Palmacci v. Umpierrez*, 121 F.3d 781, 788 (1st Cir. 1997).

the truth of the representation does not by itself establish deceit, "the very unreasonableness of such a belief may be strong *evidence* that it does not in fact exist."[47] Moreover, the court may infer intent to deceive from the debtor's reckless disregard for the veracity of a statement.[48]

Because debtors generally do not admit they made a promise with the intent to deceive the creditor or without the intent to perform, the court may "infer such fraudulent intent from the facts and circumstances of the case."[49] The debtor's fraudulent intent constitutes an issue of fact and, therefore, this Court must review the Bankruptcy Court's determination under the "clearly erroneous" standard.[50] Because a determination of intent "depends largely upon an assessment of the credibility and demeanor of the debtor, deference to the Bankruptcy Court's factual findings is particularly appropriate."[51]

Here, Appellant first argues the Bankruptcy Court erred in finding Appellant made a false representation. Appellant points to his testimony, as well as Gordon's testimony, that he never stated a set amount for the expected tax refund in the March 2005 meeting.

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47 *Id.* (emphasis in original).

48 *In re Miller*, 39 F.3d at 305.

49 *In re Bucciarelli*, 429 B.R. at 375-76 (Bankr. N.D. Ga. 2010).

50 *Barnett v. Osbourne* (*In re Osborne*), 455 B.R. 247, 252 (Bankr. M.D. Fla. 2010).

51 *Williamson v. Fireman's Fund Insurance Co.*, 828 F.2d 249, 252 (4th Cir. 1987).

However, Lamar testified to the contrary, stating that Appellant said he "had met with his accountant and that they had already prepared the tax return for [sic], and he . . . was going to get a substantial refund, he represented in excess of $100,000" that he would use to pay the existing debt and future fees and expenses.[52] Because the Bankruptcy Court's finding of fact was supported by Lamar's testimony, this Court cannot say based on contradictory testimony it was clearly erroneous.[53]

Next, Appellant challenges the Bankruptcy Court's factual finding Appellant intended to deceive Appellee when he stated the refund would be approximately $100,000. The Bankruptcy Court made this finding after multiplying Appellant's income in 2002 and 2003 by a 28 percent tax rate.[54] Because Appellant related two different versions, the Bankruptcy Court found that the total amount of taxes paid was either $87,640 or $84,990.[55] In either case, the Bankruptcy Court found it implausible that Appellant's accountant would have told Appellant that his potential tax refund would have been over $100,000. Therefore, the Bankruptcy

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52 [Doc. 3] at 216.

53 *United States v. Copeland*, 20 F.3d 412, 413 (11th Cir. 1994) (noting that the appellate court "will not ordinarily review the factfinder's determination of credibility"); *see also Palmacci*, 121 F.3d at 785 (noting "[p]articular deference" is due to the bankruptcy court's "findings that depend on the credibility of other witnesses and on the weight to be accorded to such testimony").

54 [Doc. 1-2] at 10-11.

55 *Id.*

Court concluded that Appellant did not honestly believe he would receive a refund of over $100,000.[56]

On appeal, Appellant asserts the Bankruptcy Court speculated about what the accountant would have said about prevailing tax rates and argues the Bankruptcy Court's assumptions about tax rates do not constitute evidence. However, we conclude the Bankruptcy Court did not err. Appellant testified his accountant calculated his expected tax refund using a 28 percent interest rate; therefore, the Bankruptcy Court based its findings on the evidence of Appellant's own testimony rather than speculations or assumptions.[57]

Appellant also challenges the Bankruptcy Court's factual finding that he made a misrepresentation at the November 2005 meeting. In making its finding, the Bankruptcy Court relied on Lamar's testimony that Appellant falsely stated he had not yet received the refund check. Similar to his arguments regarding the March meeting, Appellant proffers his testimony as well as his wife's, which contradicted Lamar's testimony. Additionally, he contends the Bankruptcy Court violated Federal Rule of Evidence 1003 when it based its finding of a misrepresentation on its "suspicions" about Appellant's introduction of a copy of his wife's notes from the March meeting, rather than submitting the original notes.[58] Appellant further contends the Bankruptcy Court erred in finding fault with Appellant's submission of the copy of the notes rather than the original because Appellee failed to

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56 *Id.*

57 [Doc. 3] at 305.

58 [Doc. 1-2] at 14.

object to the admission of the copy. This Court finds Appellant's arguments unpersuasive.

Rule 1003 concerns the admissibility of a copy of an original document.[59] The credibility to be accorded the duplicate remains a question of fact.[60] Acting as finder of fact, the Bankruptcy Court found the admission of the copy rather than the original raised suspicions. Because the Bankruptcy Court's finding involved the credibility or weight to be given the document, it did not violate Rule 1003.

Moreover, even if the Bankruptcy Court's suspicions about the notes violated Rule 1003, these suspicions did not constitute the Bankruptcy Court's sole basis for its findings. The Bankruptcy Court explicitly based its findings on the demeanor of the witnesses, the conflicting testimony given by Appellant and his wife, and Appellant's failure to remind Lamar of his supposed November statements in the letter sent to Lamar in July 2006.[61] Consequently, this Court cannot say the Bankruptcy Court committed clear error by crediting the testimony of one witness over that of others.

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[59] Fed. R. Evid. 1003. The Rule provides that "[a] duplicate is *admissible* to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate" (emphasis added).

[60] *Hill v. City of Houston*, 235 F.3d 1339 (Table), 2000 WL 1672663, *7 (5th Cir. 2000) (noting that "under either rule [1003 or 1008], the question of whether [the document] is a fake or rather an authentic copy, [is] a fact question which [is] properly submitted to the jury") (unpublished opinion).

[61] [Doc. 1-2] at 14.

Finally, Appellant contends the Bankruptcy Court erred by failing to "apply the heightened standards required under 11 U.S.C. § 523(a)(2)(A) and relevant case law for statements concerning future acts and omissions."[62] In other words, Appellant argues the Bankruptcy Court improperly found Appellant actually intended to deceive Appellee in making his statement in March 2005 regarding the amount of his expected tax refund.

To constitute fraud under § 523(a)(2)(A), a false statement concerning a future act or omission requires "actual intent to mislead, which is more than mere negligence."[63] However, a court may infer actual intent to deceive from the debtor's reckless disregard for the truth of the representation.[64] The debtor's knowledge that he cannot pay constitutes a circumstance from which the court may infer intent to deceive.[65]

According to Appellant, his statement in March 2005 as to the amount of his expected tax return involved a future act and was an earnestly held belief, thereby precluding a finding of fraud absent actual intent not to perform. In support of his contention that he merely held an "overly optimistic" belief that his tax return would amount to approximately $100,000,[66]

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62 [Doc. 9] at 17.

63 *Palmacci*, 121 F.3d at 788.

64 *Id.* at 788-89 (citing *Ins. Co. of N. Am. v. Cohn* (*In re Cohn*), 54 F.3d 1108, 1118-19 (3d Cir. 1995)).

65 *Id.* at 789.

66 [Doc. 12] at 3.

Appellant cites *In re Hill*.[67] In *Hill*, the bankruptcy court found that no fraudulent misrepresentation occurred where the debtor claimed he would pay legal fees by refinancing his house, even though he was completing a credit counseling course as a prerequisite to filing in bankruptcy. However, unlike the present case, the court in *Hill* found that although the debtor's belief that he would be able to pay the legal fees was "unrealistic, [the debtor's] intention appear[ed] earnestly held."[68]

Here, the Bankruptcy Court inferred Appellant's intent to deceive based on the impossibility of Appellant's representation that his income multiplied by his stated tax rate could produce a tax refund of approximately $100,000 and found Appellant's belief was not earnestly held—in other words, Appellant intended to deceive Appellee. Because this Court must give great deference to the Bankruptcy Court's factual findings regarding intent,[69] we conclude the mathematical unreasonableness of Appellant's alleged belief constitutes sufficient evidence the belief was *not* earnestly held.[70] Therefore, the Bankruptcy Court did

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67 425 B.R. 766 (Bankr. W.D. N.C. 2010).

68 *Id.* at 776.

69 *Williams v. Fireman's Fund Insurance Co.*, 828 F.2d at 252.

70 Appellant further argues that the United States Supreme Court's holding in *Bullock v. Bankchampaign, N.A.*, 133 S. Ct. 1754 (2013), effectively abrogates a creditor's ability to establish intent to deceive based on reckless disregard. However, *Bullock* involved the scienter requirement for defalcation under 11 U.S.C. § 523(a)(4) and has no application here. Moreover, to the extent Appellant raises an equitable argument based on the totality of

not commit clear error by finding Appellant knowingly misrepresented the amount of the tax refund.

Moreover, even if the Bankruptcy Court had improperly found Appellant actually intended to deceive Appellee in the March 2005 statement, its conclusion is not error because Appellant's November 2005 statement did not involve a future act or intentional omission. At the November meeting, Appellant stated he had not yet received the tax refund, when in fact he had. Because this second misrepresentation involved a past event known at the time by Appellant to be false, Appellant cannot plausibly claim he lacked intent to deceive in making the statement. Consequently, the Bankruptcy Court did not err in finding Appellant made a false statement with intent to deceive.

B. Justifiable Reliance

Although the text of § 523(a)(2)(A) does not impose a reliance requirement, the United States Supreme Court has held that, in accordance with common law tort principles of fraud, an exception to discharge under this section requires justifiable reliance by the creditor on the debtor's false statement.[71] The justifiable reliance standard "does not mean that [the creditor's] conduct must conform to the standard of the reasonable man."[72] Instead, "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case,

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the circumstances, this Court is not persuaded that Appellee's allegation of fraud requires strict scrutiny.

[71] *Field*, 516 U.S. at 69-75.

[72] *Id.* at 70-71 (quoting Restatement (Second) of Torts, § 545A, Comment *b* (1976)).

rather than of the application of a community standard of conduct to all cases."[73] Accordingly, the justifiable reliance standard is "less demanding" than the standard of reasonable reliance.[74] Under the justifiable reliance standard, the creditor need only investigate the facts if, "under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived."[75] Justifiable reliance "requires only that the creditor did not 'blindly [rely] upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.'"[76]

Here, Appellant argues the Bankruptcy Court erred in finding Appellee relied, much less justifiably relied, on Appellant's false statement. Appellant contends Appellee could not have relied on Appellant's March 2005 statement that his future tax refund would be sufficient to pay the unpaid fees because Appellee knew of Appellant's poor financial condition. In particular, Appellant points to the facts that Appellee spoke to a bankruptcy attorney about Appellant, asked Appellant's mother to pay the bill at one point, and admitted it knew of Appellant's financial problems

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[73] *Id.* at 71 (quoting Restatement (Second) of Torts, § 545A, Comment *b* (1976)).

[74] *Id.* at 61.

[75] *Id.* at 71-72 (quoting W. Prosser, *Law of Torts* § 108, p. 718 (4th ed. 1971)).

[76] *Ojeda v. Goldberg*, 599 F.3d 712, 717 (7th Cir. 2010) (quoting *Field*, 516 U.S. at 71).

arising from the business. Moreover, Appellant contends Appellee's actions after the March 2005 indicate a lack of reliance given that Appellee did not know the IRS would even approve the tax return, did not review the tax return, did not draw up any documents to reflect assignment of the funds from the tax return, and did not write a letter confirming its conversations with Appellant.

Contrary to Appellant's assertions, however, whatever Appellee may have known or suspected about Appellant's financial condition has no bearing on whether Appellee justifiably relied upon Appellant's statement in March 2005 that he would receive a tax refund. Appellant can point to no evidence of deceit with respect to the tax refund that should have been apparent to Appellee upon a "cursory examination."[77] Poor overall financial health does not inherently preclude receipt of a substantial tax refund. Therefore, under the justifiable reliance standard, Appellee had no duty to investigate the matter. That Appellant did, in fact, receive a significant tax refund in the amount of $59,851 only underscores the justifiability of Appellee's reliance, even if the refund was considerably less than Appellant had promised. Moreover, Appellant fails to cite any evidence specific to the November 2005 statement indicating Appellee could not have justifiably relied upon the statement. To the extent Appellant argues that Appellee's knowledge of Appellant's general financial condition precluded justifiable reliance, that argument fails for the same reasons it fails for the March 2005 statement.

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[77] *Id.*

At trial, Lamar testified Appellee agreed to continue representing Appellant in reliance on Appellant's false statements about the tax refund. Lamar further testified that had Appellee known the truth, it would have stopped the representation, put an attorney's lien on Appellant's file, and begun collection of unpaid fees. Because Appellant has no evidence that should have alerted Appellee to Appellant's deceit specifically regarding the tax refund, the Bankruptcy Court did not err in determining Appellee established justifiable reliance.

III. Damages

Section 523(a)(2)(A) of the Bankruptcy Code renders nondischargeable certain fraudulently-incurred debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud . . . ."[78] Consequently, the statute applies to both "the primary debtor-creditor relationship" and "secondary debt transactions."[79] While the primary debtor-creditor relationship involves provision of money, property, or services, secondary debt transactions include extensions, renewals, and refinancing.[80] A secondary debt transaction constitutes "an autonomous transaction that results in the lengthening of a debtor-creditor relationship" whereby "the creditor grants a

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[78] 11 U.S.C. § 523(a)(2)(A).

[79] *Foley & Lardner v. Biondo* (*In re Biondo*), 180 F.3d 126, 131-32 (4th Cir. 1999).

[80] *Id.*

reprieve to the debtor."[81] Therefore, an extension of credit represents "an agreed enlargement of time allowed for payment."[82]

Although the Eleventh Circuit has not addressed the issue, several courts have held § 523(a)(2) does not impose a "new money" requirement on claims arising out of secondary debt transactions.[83] In other words, "a false representation in connection with a renewal or refinancing of credit may render the entire debt nondischargeable" even if the creditor did not lend new money in reliance on the false statement.[84]

Here, Appellant argues the Bankruptcy Court erred in measuring damages by the entire amount of Appellee's claim rather than by the damages arising

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[81] *Id.*

[82] *Id.*

[83] *See Household Fin. Corp. v. Greenidge* (*In re Greenidge*), 75 B.R. 245, 247 (Bankr. M.D. Ga. 1987) (holding that "the better view is that a false representation in connection with a renewal or refinancing of credit may render the entire debt nondischargeable"); *Cho Hung Bank v. Kim* (In re *Kim*), 62 F.3d 1511 (9th Cir. 1995) (citing *Cho Hung Bank v. Kim* (*In re Kim*), 163 B.R. 157, 159 (9th Cir. BAP (Cal.) 1994)) (adopting Bankruptcy Appellate Panel's holding that there is no requirement that "'an extension of credit' be joined by an advance of further funds in order for a creditor to have a claim for relief"); *In re Ojeda*, 599 F.3d at 720 (holding that because creditor forbore from collecting the entire debt due to debtor's fraudulent inducement, the entire debt was nondischargeable); *Wolf v. Campbell* (*In re Campbell*), 159 F.3d 963, 966-67 (6th Cir. 1998) (holding that because creditor's forbearance from demanding immediate repayment of the debt was based on the false statement, the entire amount was nondischargeable).

[84] *In re Greenidge*, 75 B.R. at 247.

after Appellant's misrepresentation. Appellant does not seriously dispute the absence of a *per se* "new money" requirement for nondischargeability. Instead, he argues the measure of damages is zero because Appellee extended no new net value after Appellant's false statement in March 2005. In support of this argument, Appellant cites *Household Finance Corp. v. Greenidge* (*In re Greenidge*), wherein the Bankruptcy Court held that, even without a "new money" requirement, the refinanced portion of the debt was dischargeable because the creditor failed to establish its reliance as to that portion.[85] In effect, Appellant seeks to import a "new money" requirement into the measure of damages. Under such a rule, a creditor attempting to establish the nondischargeability of a debt would have to prove "how it would have collected the debt, what assets would have been available then but not later," and the specific "pecuniary loss due to the forbearance from collecting the debt . . . ."[86]

Appellant's reliance on *Greenidge*, however, is inapposite. There, the Bankruptcy Court held the creditor provided insufficient evidence "to prove that it forfeited any remedies or otherwise relied to its detriment on the Debtor's false financial statement in refinancing the earlier debt . . . ."[87] Here, in contrast, the Bankruptcy Court found that once Appellant became delinquent on payments, Appellee forbore from collecting the overdue amounts in reliance on Appellant's false statement. This forbearance

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85 *Id.*

86 [Doc. 9] at 25.

87 *In re Greenidge*, 75 B.R. at 247.

constituted an extension of credit. Accordingly, the entire debt is nondischargeable.

Finally, Appellant argues Appellee failed to prove any damages because the debt was uncollectible both before and after Appellant's false statements. However, "[a] creditor need not also show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit" to establish the debt is nondischargeable.[88] A debtor's "incentive to act with integrity should not end once he becomes insolvent," and bankruptcy law should avoid "creat[ing] a perverse incentive for insolvent debtors to lie to creditors to get them to forbear collection" of debts.[89] Consequently, Appellant's insolvency does not preclude Appellee from establishing that the entire debt is nondischargeable.

CONCLUSION

Having reviewed the applicable law and the arguments of the parties, the Court agrees with the decision of the Bankruptcy Court. Accordingly, it is **HEREBY ORDERED** that the decision of the Bankruptcy Court be **AFFIRMED**.

SO ORDERED, this 28th day of March, 2016.

S/C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES DISTRICT COURT

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88 *In re Campbell*, 159 F.3d at 966-67 (citing *Shawmut Bank, N.A., v. Goodrich* (*In re Goodrich*), 999 F.2d 22, 25-26 (1st Cir. 1993)).

89 *Id.*

SIGNED this 10 day of March, 2015 [seal omitted]

/s/ James P. Smith
James P. Smith
Chief United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of:	:	Chapter 7
R. SCOTT APPLING,	:	Case No. 13-30083-JPS
CONNIE F. APPLING,	:	
Debtors	:	
	:	
LAMAR, ARCHER & COFRIN, LLP,	:	
Plaintiff	:	
	:	Adversary Proceeding
v.	:	No. 13-3042
	:	
R. SCOTT APPLING,	:	
Defendant	:	

BEFORE
James P. Smith
United States Bankruptcy Judge
527 B.R. 545

MEMORANDUM OPINION

This is an adversary proceeding in which Plaintiff seeks to have its claim against Debtor R. Scott

Appling[1] determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). As originally pled in its complaint, Plaintiff contended that when Debtor promised to use an anticipated tax refund to pay legal fees owed to Plaintiff, he committed fraud because he, in fact, never intended to do so. However, at trial, Plaintiff amended its contentions to allege that Debtor lied about when an amended tax return had been prepared and the amount of the refund, and then subsequently lied about not having received it.[2]

The matter was tried on September 18 and 23, 2014. At the conclusion of the trial, the Court requested that the parties submit their closing arguments in writing. By consent of the parties, the written arguments were delayed until a transcript of the trial was obtained. The transcript has now been prepared and filed and the final brief was filed in the case on January 21, 2015. Having considered the testimony and exhibits introduced at trial, the arguments of counsel and the law, the Court now publishes its findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

FACTS

In 2002, Debtor was a mortgage loan originator who earned $270,922. In July 2003, he began working for a bank earning $3,000 per month. In June 2004, Debtor purchased a business and quit his bank job. He soon

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1 Plaintiff does not hold a claim against codebtor Connie F. Appling and she is not a party to this adversary proceeding.

2 Pursuant to Bankruptcy Rule 7015, Rule 15 F.R.Civ.P. applies in adversary proceedings. Rule 15(b)(2) provides, in part, "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."

discovered his new company had serious financial problems the prior owners had allegedly failed to disclose. With a large debt payment to the sellers approaching, Debtor decided to seek legal advice.

In July 2004, Debtor retained Plaintiff law firm to represent him and his company in an attempt to rescind the purchase of the company from its prior owners on the grounds that the financial condition of the company had been misrepresented. Debtor agreed to pay Plaintiff on an hourly basis, with invoices for fees and costs to be paid monthly. Walter Gordon, a sole practitioner in Hartwell, Georgia, was retained as local counsel on a similar fee basis. Thereafter, litigation against the prior owners and other defendants ensued in the Superior Court of Franklin County, Georgia.

By March 2005, Debtor had run up a sizeable unpaid amount of fees and costs to both Plaintiff and Mr. Gordon. Debtor owed Plaintiff approximately $60,800 and Mr. Gordon approximately $18,000. A conference was scheduled in Mr. Gordon's office in Hartwell, Georgia, to discuss the status and prospects of the litigation and how the fees could be brought current. Prior to the meeting, Debtor sent an email to David Davenport, a partner at Plaintiff law firm who was handling Debtor's case, complaining about the fees and costs being incurred in the litigation, the lack of progress in the litigation and concluding with a derogatory joke about lawyers. Robert Lamar, a partner at Plaintiff law firm who was in charge of Debtor's account at the firm, responded by letter in which Mr. Lamar gave his analysis of the status of the litigation, his response to the complaints about the fees and costs and advised Debtor that if the fees and costs

were not brought current, the firm would withdraw from representation and place an attorney's lien on all work product until the fees and costs were paid.[3]

The meeting occurred on March 18, 2005. At the meeting, Plaintiff contends that Debtor represented that his accountant had prepared an amended tax return and that he would receive a tax refund of approximately $100,000, which would be enough to pay current and future fees. Plaintiff asserts that, in reliance on these representations, Plaintiff continued to represent Debtor and did not begin collection of its fees.

The litigation was thereafter settled in stages, with settlements with each of the defendants occurring at different times. The settlements reduced Debtor's remaining financial obligations to the defendants. All matters relating to the litigation and settlement were concluded by March 2006.

On June 15, 2005, Debtor and his wife signed an amended tax return for the 2002 tax year for the refund in question. However, rather than a refund of approximately $100,000, the amended return sought a refund of only $60,718. This amount was further reduced by the IRS in October 2005 to $59,851.[4] The

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[3] In Georgia, an attorney has a lien on all papers of their client in their possession until all fees and costs for services rendered are paid. O.C.G.A. § 15-19-14(a).

[4] Although Debtor testified that both his 2002 and 2003 returns were amended, the only amended return introduced at trial was the 2002 amended return. Further, there was no testimony or other evidence that Debtor received any refund other than the refund for 2002. Accordingly, the Court concludes that the 2003 return was not amended.

evidence establishes that Debtor received a check for this amount prior to November 2005. Debtor did not pay any of the refund to Plaintiff or Mr. Gordon.

Plaintiff and Debtor had another meeting on November 2, 2005, to discuss the outstanding fees and the firm's willingness to continue with the representation, as well as filing a new law suit against a party involved in Debtor's purchase of the business who had not been sued in the original litigation. Plaintiff alleges that Debtor again made representations regarding the tax refund and, in reliance thereon, Plaintiff agreed to complete the pending litigation and forego immediate collection of the fees. However, Plaintiff refused to undertake any additional representation.

Ultimately, in June 2006, Plaintiff and Mr. Gordon allegedly learned Debtor had received and spent the refund in his business and would not use the refund to pay their fees. Plaintiff filed suit against Debtor for the unpaid fees and costs and received a judgment in October 2012 in the Superior Court of Hart County, Georgia for $104,179.60. Debtor and his wife filed Chapter 7 bankruptcy in January 2013.

Plaintiff asserts that Debtor made misrepresentations about the tax refund at both the March and November 2005 meetings. Plaintiff contends that it justifiably relied on these representations and continued to represent Debtor and forego collection of its fees. Accordingly, Plaintiff contends its claim of $104,179.60, evidenced by the judgment from the Superior Court of Hart County, Georgia, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

DISCUSSION

Plaintiff has the burden of proving by a preponderance of the evidence that the claim is nondischargeable. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991). If Plaintiff fails to prove any of the elements of the claim:

> ...the debt is dischargeable. Moreover, courts generally construe the statutory exceptions to discharge in bankruptcy "liberally in favor of the debtor," and recognize that "'[t]he reasons for denying a discharge...must be real and substantial, not merely technical and conjectural.'" In re Tully, 818 F.2d 106, 110 (1st Cir. 1987) (quoting Dilworth v. Boothe, 69 F.2d 621, 624 (5th Cir. 1934)); see also, Boyle v. Abilene Lumber, Inc., (Matter of Boyle), 819 F.2d 583, 588 (5th Cir. 1987). This narrow construction insures that the "honest but unfortunate debtor" is afforded a fresh start. Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1477 (11th Cir. 1985)...

Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir. 1994).

11 U.S.C. § 523(a)(2)(A) bars in relevant part, the discharge of debts for services or an extension or renewal of credit resulting from "false pretenses, a false representation, or actual fraud...."

> The elements of a claim under § 523(a)(2)(A) are: the debtor made a false statement with the purpose and intention of deceiving the creditor; the

> creditor relied on such false statement; the creditor's reliance on this false statement was justifiably founded; and the creditor sustained damage as a result of the false statement.

Johannessen v. Johannessen, 76 F.3d 347, 350 (11th Cir. 1996).

A fraudulently induced forbearance from collection constitutes an extension of credit for purposes of 11 U.S.C. § 523(a)(2)(A). Ojeda v. Goldberg, 599 F. 3d 712, 718 (10th Cir. 2010); Foley & Lardner v. Biondo (In re Biondo), 180 F. 3d 126, 132-33 (4th Cir. 1999); Wolf v. Campbell (In re Campbell), 159 F. 3d 963, 966 (6th Cir. 1998); Field v. Mans, 157 F. 3d 35, 43 (1st Cir. 1998). Further:

> 'As distinguished from false representation, which is an express misrepresentation[,] false pretense involves an implied misrepresentation or conduct intended to create and foster a false impression,' Minority Equity Capital Corp. v. Weinstein (In re Weinstein), 31 B.R. 804, 809 (Bankr. E.D. N.Y. 1983), and '[i]t is well recognized that silence, or the concealment of a material fact, can be the basis of a false impression which creates a misrepresentation actionable under § 523(a)(2)(A),' id.; see also, e.g., Citizens & S. Nat'l Bank v. Thomas (In re Thomas), 12 B.R. 765, 768 (Bankr. N.D. Ga. 1981) ('A debtor's silence may amount to a materially false representation prohibiting discharge of the indebtedness.').

SunTrust Bank v. Brandon (In re Brandon), 297 B.R. 308, 313 (Bankr. S.D. Ga. 2002).

> Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred.

Caspers v. Van Horne (Matter of Horne), 823 F.2d 1285, 1287 (8th Cir. 1987), abrogated on other grounds by Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d. (1991).

False Statement Made With Intention To Deceive

The March 18, 2005 Meeting

By letter dated March 9, 2005, Mr. Lamar advised Debtor that unless the fees owed to Plaintiff and Mr. Gordon were brought current promptly, the firms would withdraw from the representation and place an attorney's lien on all of their work product. The evidence establishes that Debtor understood that the trial of his state court litigation was to take place within the next few months.

Debtor testified that he called his accountant, Mike Strickland, CPA, before the meeting to discuss possible sources of cash. According to Debtor, Strickland told him the IRS allowed recouping of losses from the business against taxes previously paid and inquired about Debtor's 2002 and 2003 income.[5] At one point in

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[5] The evidence suggests that Mr. Strickland did not prepare these returns. Debtor was referred to and retained Strickland in June 2004, which would be after these returns were due. Transcript, Sept. 18, 2014, page 135.

his testimony, Debtor testified that he told Strickland his income for 2002 was $295,000 and that Strickland calculated that, based on a 28 percent tax rate, Debtor would have paid taxes of over $100,000. Based on this calculation, he testified that Strickland told him he could get a tax refund for that approximate amount. At another point in his testimony, Debtor testified that he used his last paycheck from 2002[6] to provide Strickland with his income, then provided his wife's income and his 2003 income and Strickland estimated the taxes paid and potential refund at $104,000 to $105,000. Debtor testified that at the March meeting he told Mr. Lamar and Mr. Gordon that, based on Strickland's advice, there was a possibility he would receive a $100,000 refund and, if he got that amount, he could pay their bills.

Mr. Lamar testified that Debtor told them that the amended return had been prepared, was ready for filing, and that he would be getting $100,000 back, which he would use to pay their fees. Mr. Gordon testified that Debtor told them he felt like the refund would be approximately $100,000 and that he would use the money to pay their fees. However, Mr. Gordon testified that, "I'd asked him if he had the return. I don't think it had been prepared at that point."[7]

Plaintiff contends that Debtor's representations regarding the possible tax refund were false for two

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6 At another point, Debtor testified that he used his 2002 W-2 form to provide Strickland with this information. The difference in the testimony is not material since both forms would have disclosed the same information regarding income and taxes withheld.

7 Transcript, Sept. 18, 2014, page 17.

reasons. First, Plaintiff contends that Debtor falsely represented that the amended return had been prepared and was ready to file. Secondly, Plaintiff contends that Debtor knowingly lied about the refund amount because Debtor knew the refund would not be approximately $100,000.

As for the alleged misrepresentation that the amended return had been prepared by the March 18, 2005 meeting, the evidence is conflicting. The evidence establishes that the return had, in fact, not been prepared by that time. Mr. Lamar testified that Debtor represented that it had. Both Debtor and Mr. Gordon testified that no such representation was made. In light of the fact that Mr. Gordon has no financial interest in this litigation (and even if he did, his testimony would be adverse to that interest), the Court is inclined to accept his version of facts and finds that Plaintiff has failed to prove by a preponderance of the evidence that Debtor represented at the March meeting that the amended return had already been prepared.

However, the Court does find that Plaintiff has carried its burden to prove that Debtor knowingly made a false representation with intent to deceive when he represented that the refund would be approximately $100,000. As stated, Debtor gave two slightly different versions of his conversation with Strickland. In the first version, he testified that he reported to Strickland his 2002 income of $295,000 and his 2003 income of $18,000, a total of $313,000. If Strickland assumed a tax rate of 28 percent, as Debtor testified, the taxes on $313,000 income would be $87,640. The Court does not believe that an experienced CPA would have told Debtor, based on

these numbers, that the taxes paid (and thus the amount eligible for refund) would have been approximately $100,000.

In the second version, he testified that he gave Strickland his 2002 income of $260,000 from either his last paycheck or his 2002 W-2 form. He then added his wife's income for 2002 and 2003 and his 2003 income, and from this information, Strickland came up with taxes (and thus a potential refund) of $104,000 to $105,000. From the 2002 amended return, we know that Debtor and his wife's adjusted gross income for 2002 was $296,325, on which they paid taxes of $68,190. Debtor and his wife's total income in 2003 was at most $60,000.[8] Assuming a 28 percent tax rate, taxes on the 2003 income would have been $16,800. Thus, the total taxes paid by Debtor and his wife in 2002 and 2003 was only $84,990. It is simply not plausible to believe that Strickland, with this information, would have told Debtor that his taxes and potential refund would be between $104,000 and $105,000.

Accordingly, the Court does not believe Debtor's testimony that he honestly thought that he would receive a refund of approximately $100,000. Rather, the Court finds that Debtor knowingly misrepresented the amount of the tax refund to prevent Plaintiff from withdrawing from representing him and beginning collection activities.

The November 2, 2005 Meeting

Debtor testified that after receiving the tax refund in late October 2005, he called Mr. Lamar to schedule a meeting to discuss the outstanding fees and starting

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8 Transcript, Sept. 23, 2014, page 46.

new litigation. Debtor testified that he and his wife attended the meeting on November 2, 2005 in Plaintiff's Atlanta office.[9] According to Debtor, he asked Mr. Lamar to reduce the bill and Mr. Lamar refused. He testified that he asked Mr. Lamar to start the new litigation on a contingency fee basis and Mr. Lamar refused. He testified that Mr. Lamar asked about the refund and that Debtor responded that he had the refund but that it was less than expected. However, he testified that he did not tell Mr. Lamar the actual amount of the refund. He testified that he then told Mr. Lamar that if he paid the refund to Plaintiff, he would be out of business, but if he kept the money, he might have a chance at keeping his business going. Debtor testified, "And I looked at him and I said, 'So I guess you know what my decision is going to be.' And my wife and I stood up and we walked out."[10]

Debtor's wife, Mrs. Appling, gave testimony that was generally consistent with Debtor's version. She testified that Debtor told Mr. Lamar that he had received the refund but did not disclose the amount. At trial she produced a copy, but not the original, of notes she said she made at the meeting and completed on their drive home. She said the original was somewhere in multiple boxes of files and she had found the copy in a box of bills a couple of months before the trial. The notes state "I too have to make a business decision & decide to try to keep the business open as long as I can"[11] which could be interpreted to be

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9 Mr. Gordon was not at this meeting.

10 Transcript, Sept. 18, 2014, page 172.

11 Defendant Exhibit 10.

consistent with Debtor's version that he told Mr. Lamar that he was keeping the money. However, Mrs. Appling testified that Debtor told Mr. Lamar, "...I have to make a business decision either to keep my business afloat or go bankrupt. That's what he said. He never said he was not going to pay him. He said, I have to make a business decision, just like you, Bob Lamar. I have to decide if I am going to keep my business going and try to keep a roof over my family's house, my family—that's the decision I have to make. He did not say, I'm not going to pay you."[12] This testimony suggests that Debtor had not made up his mind on what he would do with the tax refund, which is contrary to Debtor's testimony.

Mr. Lamar's recollection of the meeting was very different. Although he testified he refused the request to reduce the bill and to take on the new litigation, he testified that when he asked Debtor whether Debtor had received the refund, Debtor said his accountant had not properly handled the amended tax return, that Debtor had to refile it and that Debtor had not yet received the refund. Mr. Lamar testified that Debtor represented he still expected to get an amount sufficient to recover all of the fees and, based upon that representation, Plaintiff continued to represent Debtor and did not pursue immediate collection efforts.

Mr. Lamar testified that he did not learn until June 2006 that Debtor had received and spent the refund money and was not going to pay anything to Plaintiff. Upon learning this, Mr. Lamar immediately wrote a letter to Debtor, dated June 26, 2006, recapping the course of the litigation, reminding Debtor of his

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12 Transcript, Sept. 23, 2014, pages 95-96.

promise to use the refund to pay the fees, stating that Plaintiff had just learned that the refund had been received and spent and threatening suit if all fees were not paid within fourteen days. He concluded the letter by opining that any debt to Plaintiff could not be discharged in bankruptcy due to Debtor's fraudulent representations.

Debtor responded by letter dated July 19, 2006, in which Debtor complained about how his case had been handled, the amount of the fees, Plaintiff's refusal to reduce the fees and Plaintiff's refusal to pursue new litigation. He then reported in the letter that after the November meeting, he met with a bankruptcy attorney who recommended that Debtor keep the money to try to keep the business open. He further stated "There was nothing fraudulent on my part in not giving you that refund. It should be obvious as to what I chose to do since we are still open."[13] This suggests that Debtor did not make the decision to keep the refund until after meeting with the bankruptcy attorney, which is contrary to Debtor's testimony that he told Mr. Lamar of his decision at the November meeting.

Having heard the evidence, observed the demeanor of the witnesses and reviewed the documents introduced, the Court finds that Plaintiff has proven by a preponderance of the evidence that Debtor, with intent to deceive, made an intentional and knowingly false representation at the November 2005 meeting that he had not yet received the refund. The Court does not believe the testimony of Debtor and his wife. Both Debtor and his wife gave conflicting testimony as to what Debtor told Mr. Lamar at the November

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[13] Plaintiff Exhibit 4.

meeting. The finding of a copy, but not the original, of the alleged notes from the November meeting seems suspicious. Given Debtor's propensity to recount past events in the light most favorable to his perspective, the Court believes that if he had told Mr. Lamar at the November meeting that he had received the refund, that it was less than expected, and that he planned to use it to keep the business open instead of paying Plaintiff, Debtor would have reminded Mr. Lamar of this in his July 2006 letter. That he did not do so strongly suggests that it did not happen.

On the other hand, Mr. Lamar's actions in sending the letter in June 2006, is consistent with his testimony that Debtor told him at the November meeting that he had not yet received the refund. Accordingly, the Court finds Mr. Lamar's testimony more credible.

In addition, the Court finds that Debtor intentionally mislead Plaintiff and committed a false pretense by not disclosing the true amount of the refund at the November meeting. Based on his prior representation at the March meeting, Debtor knew that Mr. Lamar believed the refund was supposed to be approximately $100,000. Debtor testified he told Mr. Lamar at the November meeting that the refund was less than expected but he did not disclose the actual amount of the refund. Mr. Lamar testified Debtor continued to represent the refund was sufficient to cover all fees.

The Court does not believe Debtor's testimony. Given the amount of outstanding fees and that the refund was the sole source of payment, had Debtor told Mr. Lamar that the refund was less than expected, Mr. Lamar would have demanded to know the exact amount so that he could make a decision as to how his

firm would proceed. By failing to disclose that the actual refund was forty percent less than previously represented, and an amount insufficient to pay the outstanding fees owed to Plaintiff and Mr. Gordon, Debtor committed a false pretense.[14] Once again the intent to deceive is obvious. By failing to admit that he had received the refund and disclosing that it was significantly less than previously represented, Debtor was again able to avoid Plaintiff terminating its representation and beginning collection activity.

Reliance

Having determined that Debtor made misrepresentations regarding the tax refund with intent to deceive, the Court now turns to the reliance requirement. As this Court previously held in denying Debtor's motion to dismiss:

> Although section 523(a)(2)(A), by its terms, does not contain a reliance requirement, the Supreme Court, in Field v. Mans, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995), concluded that Congress intended to adopt the common-law meaning of the terms "false pretenses, a false representation, or actual fraud" for purposes of section 523(a)(2)(A). 516 U.S. at 69, 116 S.Ct. at

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[14] Debtor's reliance on the case of Duncan v. Bucciarelli (In re Bucciarelli), 429 B.R. 372 (Bankr. N.D. Ga. 2010) is misplaced. Bucciarelli did not involve an act of omission. Rather, Bucciarelli involved a promise to pay which the court found the debtor never intended to perform. Although the Plaintiff here initially made a similar allegation, that allegation was abandoned at trial. See supra p. 3.

> 443. Therefore, the Court ruled that, consistent with common-law requirements, a claim under section 523(a)(2)(A) requires "justifiable reliance". 516 U.S. at 70-76, 116 S.Ct. at 443-46.
>
> The Court made clear that "justifiable reliance" allows the creditor to rely on the representation of the debtor unless there are facts known to the creditor that would have alerted him to the falsity of the debtor's representation. Thus, a creditor is entitled to rely on the debtor's representation that his property is free of liens without first conducting a title search of the public real estate records. 516 U.S. at 70, 116 S.Ct. at 444.

Lamar, Archer & Cofrin, LLP v. Appling (In re Appling), 500 B.R. 246, 253 (Bankr. M.D. Ga. 2013) (footnote omitted).

Mr. Lamar testified that Plaintiff agreed to continue its representation of Debtor and forego collection activities in reliance upon Debtor's representations regarding the tax refund. He testified that with respect to both meetings, had Plaintiff known the truth, Plaintiff would have immediately withdrawn from the representation, placed an attorney's lien on Debtor's file and begun collection activities. There was no evidence to the contrary.

Debtor argues that Plaintiff could not justifiably rely on Debtor's representations because Plaintiff was fully aware of Debtor's precarious financial condition and had asked Debtor's mother to assist Debtor in

paying the bill. However, Plaintiff's knowledge of Debtor's financial condition supports Plaintiff's justifiable reliance. Plaintiff clearly believed that the tax refund was the only source of cash Debtor would have to pay the fees. Plaintiff was aware of no facts which would have led it to doubt its client's representations about the amount of the refund or the timing of its receipt and, thus, was not on notice to conduct any further inquiry. Accordingly, Plaintiff was justified and did rely on Debtor's representations regarding the tax refund.

Damages

Debtor argues that Plaintiff is only entitled to those damages which arose after the alleged misrepresentations. He contends that because his payments after the meetings exceeded the fees earned, any nondischargeable amount must be significantly less than the full amount of Plaintiff's claim, much of which is composed of fees earned before the misrepresentations were made. However, this Court has already addressed this issue in its prior decision denying Debtor's motion to dismiss. As this Court held:

> However, as explained by the court in Foley & Lardner v. Biondo (In re Biondo), 180 F.3d 126 (4th Cir. 1999):
>
> > Through explicit language, Congress provided not only that debts incurred through the direct provision of money, property, or services, but also that the extension, renewal, or refinancing of credit, would fall under the purview of Bankruptcy Code § 523(a)(2)(A)...

> Section 523(a)(2)(A) covers debts incurred through the direct provision of 'money, property, [or] services.' As noted above, the primary debtor-creditor relationship is covered by § 523(a)(2)(A) through express language extending its scope to debts incurred through the direct acquisition of value. See 11 U.S.C. § 523(a)(2)(A) (including 'any debt...for money, property, services'). Section 523(a)(2)(A), however, also reaches secondary debt transactions-extensions, renewals, and refinancing...
>
> Our definition focuses on an 'extension' of credit as an autonomous transaction that results in the lengthening of a debtor-creditor relationship. Black's Law Dictionary defines extension as '[a]n allowance of additional time for the payment of debts.' Black's Law Dictionary 583 (6th ed. 1990). In other words, despite the fact that a debt may already be due, the creditor grants a reprieve to the debtor....A extension of credit is analogous to the classic forbearance granted by a creditor in relation to a matured debt. Extensions of credit under 523(a)(2) are thus properly viewed as merely an agreed enlargement of time allowed for payment.

180 F.3d at 131-32.

See Ojeda v. Goldberg, 599 F.3d 712 (7th Cir. 2010) (although original loan not

> obtained by fraud, extension procured by fraud made entire debt nondischargeable); Wolf v. Campbell (In re Campbell), 159 F.3d 963 (6th Cir. 1998) (fraudulently obtained extension of a nonfraudulent, dischargeable old debt renders debt nondischargeable even though debt was not collectable at time of extension because debtor was insolvent); Cho Hung Bank v. Kim (In re Kim), 62 F.3d 1511 (9th Cir. 1995) (although original loan was obtained without fraud, extension obtained through false statement made debt nondischargeable even though no new money was advanced at time of extension); Household Finance Corp. v. Greenidge (In re Greenidge), 75 B.R. 245, 247 (Bankr. M.D. Ga. 1987) (Laney, J.) (false representation in connection with renewal or refinancing of credit renders entire debt nondischargeable).

In re Appling, at 254-55.

The Court also rejects Debtor's argument that Plaintiff has failed to show how it could have collected its debt, given Debtor's financial condition. In Wolf v. Campbell (In re Campbell) the Sixth Circuit stated:

> ...Campbell argues that the statutory phrase "to the extent obtained by" requires a creditor to demonstrate in a quantifiable manner that he was further injured because he lost a collection remedy or incurred some other detriment by forbearing. Campbell contends that

the Wolfs cannot establish such injury since he was already insolvent when the Wolfs made the extension of credit. In other words, Campbell claims that the Wolfs lost nothing as a result of waiting to pursue collection because they would not have been able to collect from him anyway at the time they decided to forbear.

The Ninth Circuit seems to agree with this argument. It has construed the statute to require the creditor to establish damage through the loss of a valuable collection remedy. But several other circuits have declined to so hold, and we think they have the better side of the argument. *Compare In re Siriani*, 967 F.2d 302, 305 (9th Cir. 1992), *with Matter of McFarland*, 84 F.3d 943, 947 (7th Cir.), *cert. denied*, ---- U.S. -----, 117 S.Ct. 302, 136 L.Ed.2d 220 (1996); *Matter of Norris*, 70 F.3d 27, 29 n. 6 (5th Cir. 1995); *In re Goodrich*, 999 F.2d 22, 25 (1st Cir. 1993).

We reject Campbell's theory regarding the meaning of the phrase "to the extent obtained by." A contractual "refinancing" or "extension of credit" is sufficient without showing further damage. A creditor need not also show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit. See the thorough discussion of this issue in *Goodrich*, 999 F.2d at 25-26.

. . .

> To hold otherwise would create a perverse incentive for insolvent debtors to lie to creditors to get them to forbear collection of past due indebtedness and would remove the primary legal incentive for fair dealing namely, nondischargeability in bankruptcy when a contract is induced by fraud. A borrower's incentive to act with integrity should not end once he becomes insolvent. The bankruptcy law should encourage, not discourage, honesty among contracting parties, especially when there is temptation to lie because of the risk of default.

159 F.3d 963, 966-67 (6th Cir. 1998).

In this case, when the March 2005 meeting occurred, Debtor owed Plaintiff $60,819.97. When the November meeting occurred, Debtor owed Plaintiff $58,796.32. Those fees were due and payable at those times. As a result of Debtor's misrepresentations, Plaintiff agreed to continue to represent Debtor and to not withdraw or attempt collection of the fees. Thus, Plaintiff gave Debtor an extension with respect to the fees and costs then due. This made the entire debt nondischargeable.

CONCLUSION

Plaintiff's claim against Debtor of $104,179.60 is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). An order in accordance with this memorandum opinion will be entered.

UNITED STATES BANKRUPTCY COURT
M.D. Georgia
Athens Division

In the Matter of R. Scott APPLING,
Connie P. Appling, Debtors.

Lamar, Archer & Cofrin, LLP
Plaintiff

v.

R. Scott Appling, Defendant.

Bankruptcy No. 13–30083–JPS
Adversary No. 13–3042

Sept. 30, 2013

500 B.R. 246

MEMORANDUM OPINION

JAMES P. SMITH, Bankruptcy Judge.

Before the Court is Defendant's motion to dismiss Plaintiff's complaint on the ground that the complaint fails to state a claim upon which relief can be granted pursuant to Bankruptcy Rule 7012 and Fed.R.Civ.P. 12(b)(6). Plaintiff, in its complaint, objects to the dischargeability of its claim against Defendant pursuant to 11 U.S.C. § 523(a)(2)(A). The Court, having considered the motion, the response and the complaint, now publishes this memorandum opinion.

When challenged under Rule 12(b)(6):

> "To survive ... a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting

> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). The plausibility standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the defendant's liability. *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965.

Miyahira v. Vitacost.com, Inc., 715 F.3d 1257, 1265 (11th Cir.2013). Accordingly, accepting as true the allegations in Plaintiff's amended complaint[1], Plaintiff's claim is based on the following facts.

Plaintiff is a law firm that represented Defendant and his company, Hartwell Enterprises, Inc. ("Hartwell"), in litigation in the Superior Court of Franklin County, Georgia. In March 2005, Plaintiff's unpaid legal fees for representing Defendant and Hartwell had grown to $66,710.57. Robert Lamar ("Lamar"), a partner of Plaintiff, had a meeting with Defendant and advised that Plaintiff would have to withdraw from the representation unless the legal fees were brought current. Defendant advised Lamar that his accountant had just prepared his 2004 tax return and that he would be receiving a tax refund in excess of $100,000. Defendant represented to Lamar that the tax refund would be sufficient to pay all outstanding fees and agreed to pay those fees, as well as subsequent fees, as soon as the tax refund was received if Plaintiff would continue to represent him and Hartwell and forego immediate collection of the past due amounts. In reliance upon this promise, Plaintiff

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[1] A hearing was held on July 2, 2013, on Defendant's objection to Plaintiff's motion to amend its complaint. For the reasons stated at the hearing, the Court has entered an order granting Plaintiff's motion to amend.

continued to represent Defendant and Hartwell and did not institute collection efforts.

In November 2005, Defendant again confirmed his promise to use his tax refund to pay all of Plaintiff's fees. Plaintiff continued to represent Defendant and his company and successfully settled the superior court litigation in March 2006. By this time, the unpaid fees had grown to $104,179.60. When Defendant did not pay these fees, Plaintiff obtained judgment against Defendant for this amount in the Superior Court of Hart County, Georgia.

Plaintiff alleges that when Defendant promised to use his tax refund to pay the fees, Defendant had no intent to do so or, in the alternative, had no reasonable basis to believe the refund would be sufficient to pay the fees. Plaintiff alleges that, through his knowledge of the distressed financial state of Hartwell, Defendant knew the refund would not be available for payment of the fees. Further, Plaintiff alleges that when it met with Defendant in November 2005, and Defendant renewed his promise regarding the tax refund, Defendant had already received the refund and spent the refund on the operations of Hartwell. Accordingly, Plaintiff alleges that its claim against Defendant arose as a result of Defendant's "false pretenses, a false representation, or actual fraud" and is therefore not dischargeable under 11 U.S.C. § 523(a)(2)(A).

DISCUSSION

11 U.S.C. § 523(a)(2) provides, in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . .

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
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> (iii) on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . .

Statement Respecting Defendant's Financial Condition

Defendant contends that his alleged oral representation regarding his intent to use his tax refund to pay the fees is not actionable under section 523(a)(2)(A) because the alleged representation is "a statement respecting the debtor's . . . financial condition" which, pursuant to section 523(a)(2)(B), must be in writing. As explained by the Bankruptcy Appellant Panel for the Sixth Circuit:

> Subsections (A) and (B) are mutually exclusive. All statements regarding a debtor's financial condition, whether written or oral, are expressly excluded from subsection (A). Rather, such a creditor must proceed under subsection (B) and satisfy the requirement that the statement of financial condition be in writing. A debt based upon an oral misrepresentation of financial condition is not

> actionable and will be dischargeable. Conversely, a debt obtained through fraudulent written statements about a debtor's financial condition will be nondischargeable. As a result of this construction, whether a debt under this section is dischargeable or nondischargeable depends on whether the fraudulent misrepresentation (i) is oral or in writing and (ii) whether the statement concerns the debtor's financial condition . . .
>
> Two views have emerged on the proper interpretation of the phrase "respecting the debtor's . . . financial condition." The "broad interpretation" includes any communication that has a bearing on the debtor's financial position. In other words, any communication addressing the status of a single asset or liability qualifies. The "strict interpretation," on the other hand, limits statements "respecting the debtor's . . . financial condition" to communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities.

Prim Capital Corp. v. May (In re May), 368 B.R. 85, 2007 WL 2052185, at *5–6 (6th Cir. BAP July 19, 2007) (unpublished decision) (internal citations omitted).

The Eleventh Circuit has not addressed this issue. The Fifth Circuit[2] and the Tenth Circuit[3] have adopted the "strict interpretation". The Fifth Circuit noted

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[2] *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671 (5th Cir.2012), *cert denied* — U.S. ——, 133 S.Ct. 845, 184 L.Ed.2d 654 (2013).

[3] *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700 (10th Cir.2005), *cert denied* 547 U.S. 1163, 126 S.Ct. 2321, 164 L.Ed.2d 840 (2006).

that the Fourth Circuit, in *Engler v. Van Steinburg (In re Van Steinburg)*, 744 F.2d 1060 (4th Cir.1984), apparently followed the "broad interpretation."[4]

The Fifth Circuit noted that the Eighth Circuit's[5] construction of section 523(a)(2)(A) was consistent with the construction applied by the Fifth and Tenth Circuits.[6] *Id.* Bankruptcy courts have reached conflicting conclusions.[7] For the reasons set forth by the Fifth Circuit in *Bandi v. Becnel, supra*, this Court adopts the "strict interpretation" as to the meaning of "a statement respecting the debtor's ... financial condition".

This case is similar to the case of *Barns v. Belice (In re Belice)*, 461 B.R. 564 (9th Cir. BAP 2011). There, in connection with obtaining a loan, the debtor made a number of representations regarding specific assets and the probable sale of a business to provide a source of funds for repayment of the loan. The court, adopting the "strict interpretation", held that the representations:

> [R]elate to a handful of [debtor's] assets, but they do not reveal anything meaningful or comprehensive about his overall net worth. These statements do not purport to reflect all of [debtor's] assets, and they tell us nothing regarding his liabilities or any liens against any of his

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4 683 F.3d at 677.

5 *Rose v. Lauer (In re Lauer)*, 371 F.3d 406 (8th Cir.2004)

6 683 F.3d at 677.

7 *See Spencer v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 112–13 (2nd Cir.2002) (collecting cases).

> property.... Accordingly, under our interpretation of the financial condition phrase, [debtor's] alleged misrepresentations do not amount to a statement respecting his financial condition. At most, they are isolated representations regarding various items that might ultimately be included as assets in a balance sheet or in a statement of net worth.

Id. at 579. Similarly, in the case of *In re May*, *supra*, the court held that a promise by a debtor attorney that he would be able to repay a loan with fees he expected to receive from the settlement of a case was "not related to [his] overall financial health but ... related to a single debt and the potential of one source of income" and therefore was actionable under § 523(a)(2)(A). *Id.* at *7.

In the case at bar, the alleged misrepresentation is that a single asset, the tax refund, would be used to pay Plaintiff's legal fees. This is not a representation as to Defendant's overall financial condition or net worth.

In support of his position, Defendant relies on the case of *Baker v. Sharpe (In re Sharpe)*, 351 B.R. 409 (Bankr.N.D.Tex.2006). In that case, the debtor made an oral representation that he had hidden funds from his wife during their divorce and that the funds would be available to repay a loan as soon as the divorce was final. The court held that this representation concerned the debtor's financial condition and therefore was not actionable under § 523(a)(2)(A). However, in light of the subsequent decision by the Fifth Circuit Court of Appeals in *Bandi*, it appears that the *Sharpe* case has been abrogated.

In addition, Defendant relies on the case of *Bancorpsouth Bank v. Callaway (In re Callaway)*, 2006 WL 6589022 (Bankr.N.D.Ga. Nov. 28, 2006).

There, the debtor made oral representations to the creditor that he would receive substantial distributions from a trust each year and that this would provide him with funds to repay a loan. The court agreed that the "strict interpretation" was the proper approach in considering section 523(a)(2). Nevertheless, citing *Sharpe* and *Joelson* for support, it found that these statements were statements concerning the debtor's financial condition. *Id.* at *21.

Of course, as previously stated, it appears that *Sharpe* has been abrogated by the Fifth Circuit's *Bandi* decision. Further, the *Callaway* court's analysis of the Tenth Circuit's decision in *Joelson, supra,* appears flawed. The court analyzed *Joelson* by stating:

> The *Joelson* case involved a debtor who persuaded the plaintiff to loan her $50,000 by misrepresenting that her brother would give her money to repay the debt and that she would provide assets, including real estate and antique cars, to be used as collateral for the loan. The Bankruptcy Appellant Panel affirmed the bankruptcy court's holding that the statement regarding the fact that her brother would give her money to repay the loan was an oral statement respecting the debtor's financial condition, but that the statements regarding the particular assets to be used as collateral were not broad enough to be considered statements regarding her overall financial health. It appears that the only issue before the Tenth Circuit was the bankruptcy appellant panel's decision that the debtor's misrepresentation as to the ownership of the assets did not constitute a statement respecting the debtor's financial condition. The Tenth Circuit affirmed that decision, but did not have the

> opportunity to address the panel's decision that the statement regarding the debtor's ability to obtain money from her brother to repay the debt was an oral statement respecting her financial condition. At [sic] to that issue, the panel had concluded that this statement was a statement respecting financial condition because it involved her ability to generate income and "[e]ven the narrow interpretation includes statements of 'ability to generate income'" *In re Joelson*, 307 B.R. 689, 696 (10th Cir. BAP 2004).

Id. However, this analysis appears to be incorrect because the Tenth Circuit, in *Joelson*, stated, "Second, Joelson made representations as to her intention and specific ability to obtain financing from her brother to repay Cadwell's loan (the 'Repayment Representations')." 427 F.3d at 714. The circuit court then held:

> Similarly, the Repayment Representations are not a statement as to Joelson's overall financial health. Joelson's representation to Cadwell that Cadwell would be able to look to Joelson's brother for repayment is analogous to Joelson's representations to Cadwell that she owned one particular asset. Just as a statement about one of Joelson's assets is not a statement that reflects Joelson's overall financial health, and therefore does not 'respect [ ] the debtor's . . . financial condition,' a statement about one part of Joelson's income flow—the flow of funds from her brother—does not reflect Joelson's overall financial health. Therefore, the Repayment Representations also are not 'respecting the debtor's . . . financial condition'.

Id. at 715. Thus, because the Tenth Circuit reversed the holding of the Bankruptcy Appellant Panel in *Joelson*, the reliance by the court in *Callaway* upon the Bankruptcy Appellant Panel decision was in error.

In the case at bar, the Court finds that the alleged oral misrepresentation regarding the use of the tax refund to pay the fees was not a representation "respecting the debtor's ... financial condition". Accordingly, Plaintiff has stated a claim under section 523(a)(2)(A).

Promise of Future Act

Defendant also argues that to state a claim under section 523(a)(2)(A), the misrepresentation must be about current or past facts. Defendant argues that the alleged promise to pay fees with the tax refund was a promise to do a future act, which is not actionable under section 523(a)(2)(A).

As held by the Fifth Circuit in *Allison v. Roberts (In re Allison)*, 960 F.2d 481 (5th Cir.1992), under section 523(a)(2)(A), a misrepresentation must:

> [B]e of past or current acts; a promise to perform acts in the future is not considered a qualifying misrepresentation merely because a promise subsequently is breached. A debtor's misrepresentation of his intentions, however, may constitute a false representation within the meaning of the dischargeability provision if, when the representation is made, the debtor has no intention of performing as promised.

960 F.2d at 484 (citations omitted). In this case, Plaintiff's amended complaint alleges that when the promise was first made, Defendant knew that the refund would not be available to pay the fees because it

would be needed to keep his company, Hartwell, in business. Plaintiffs further allege that when the promise was renewed in November 2005, Defendant had no intent to perform because he had already received and spent the refund. Although it remains to be seen whether Plaintiff can prove these allegations, by alleging that Defendant never intended to perform as promised, Plaintiff's complaint states a claim for relief.

Justifiable Reliance

Defendant also argues that Plaintiff's complaint fails to state a claim because Plaintiff does not plead any facts to establish justifiable reliance on Defendant's promise. Although section 523(a)(2)(A), by its terms, does not contain a reliance requirement,[8] the Supreme Court, in *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995), concluded that Congress intended to adopt the common-law meaning of the terms "false pretenses, a false representation, or actual fraud" for purposes of section 523(a)(2)(A). 516 U.S. at 69, 116 S.Ct. at 443. Therefore, the Court ruled that, consistent with common-law requirements, a claim under section 523(a)(2)(A) requires "justifiable reliance". 516 U.S. at 70–76, 116 S.Ct. at 443–46.

The Court made clear that "justifiable reliance" allows the creditor to rely on the representation of the debtor unless there are facts known to the creditor that would have alerted him to the falsity of the debtor's representation. Thus, a creditor is entitled to rely on the debtor's representation that his property is free of

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[8] Contrast section 523(a)(2)(B) that specifically requires reasonable reliance on a false statement in writing regarding the debtor's financial condition.

liens without first conducting a title search of the public real estate records. 516 U.S. at 70, 116 S.Ct. at 444. On the other hand, a creditor is:

> [R]equired to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, [this] rule ... applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

516 U.S. at 71, 116 S.Ct. at 444 (quoting Restatement of Torts, § 541, Comment a).

Defendant contends that:

> At the time of the alleged misrepresentation, there were too many unknowns for anyone, much less the sophisticated Plaintiff law firm here, to rely on ... In this case, Plaintiff did not know that the taxing authority would approve the return, the actual amount of the return, or the timing of the payment of the refund. Plaintiff apparently did not even take the opportunity to review the tax return itself. No document was drawn up to reflect any assignment of the funds from the tax return. There is not even

> a letter from Plaintiff to Defendant confirming the alleged conversations about the tax return.

Defendant's Motion To Dismiss, Docket No. 7, p. 6. However, Defendant misses the point of Plaintiff's complaint. Plaintiff does not allege that Defendant made a misrepresentation regarding the validity or amount of the refund. Indeed, in his answer, Defendant, "admits that he was entitled to a tax refund for the year 2004 which he reasonably believed in March 2005 would be approximately $100,000." Answer to Amended Complaint, Docket No. 15, paragraph 9. Rather, the alleged misrepresentation is Defendant's promise that he would use the refund upon its receipt to pay the fees when he had no intent to perform the promise when it was made.

Given the relatively low bar the creditor must clear to show justifiable reliance, it appears sufficient, at least for purposes of a motion under Rule 12(b)(6), for Plaintiff to have stated that it did justifiably rely on Defendant's promise. Accordingly, Plaintiff has stated a claim.

Amount of Damages

Finally, Defendant argues that Plaintiff is only entitled to those damages which arose after the alleged misrepresentation in March 2005. However, as explained by the court in *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126 (4th Cir.1999):

> Through explicit language, Congress provided not only that debts incurred through the direct provision of money, property, or services, but also that the extension, renewal, or refinancing of credit, would fall under the purview of Bankruptcy Code § 523(a)(2)(A) . . .

> Section 523(a)(2)(A) covers debts incurred through the direct provision of 'money, property, [or] services.' As noted above, the primary debtor-creditor relationship is covered by § 523(a)(2)(A) through express language extending its scope to debts incurred through the direct acquisition of value. *See* 11 U.S.C. § 523(a)(2)(A) (including 'any debt ... for money, property, services'). Section 523(a)(2)(A), however, also reaches secondary debt transactions-extensions, renewals, and refinancing ...
>
> Our definition focuses on an 'extension' of credit as an autonomous transaction that results in the lengthening of a debtor-creditor relationship. *Black's Law Dictionary* defines extension as '[a]n allowance of additional time for the payment of debts.' *Black's Law Dictionary* 583 (6th ed. 1990). In other words, despite the fact that a debt may already be due, the creditor grants a reprieve to the debtor.... A extension of credit is analogous to the classic forbearance granted by a creditor in relation to a matured debt. Extensions of credit under 523(a)(2) are thus properly viewed as merely an agreed enlargement of time allowed for payment.

180 F.3d at 131–32.

See Ojeda v. Goldberg, 599 F.3d 712 (7th Cir.2010) (although original loan not obtained by fraud, extension procured by fraud made entire debt nondischargeable); *Wolf v. Campbell (In re Campbell)*, 159 F.3d 963 (6th Cir.1998) (fraudulently obtained extension of a nonfraudulent, dischargeable old debt renders debt nondischargeable even though debt was not collectable at time of extension because debtor was insolvent); *Cho Hung Bank v. Kim (In re Kim)*, 62 F.3d 1511 (9th

Cir.1995) (although original loan was obtained without fraud, extension obtained through false statement made debt nondischargeable even though no new money was advanced at time of extension); *Household Finance Corp. v. Greenidge (In re Greenidge)*, 75 B.R. 245, 247 (Bankr.M.D.Ga.1987) (Laney, J.) (false representation in connection with renewal or refinancing of credit renders entire debt nondischargeable).

In this case, at the time the alleged misrepresentation was made in March 2005, the outstanding legal fees owed by Defendant to Plaintiff were about $66,710. Those fees were due and payable at that time. By agreeing to continue to represent Defendant and his company and not to withdraw or attempt collection of the fees, Plaintiff gave Defendant an extension with respect to the fees then due. Accordingly, in addition to asserting a claim for the fees incurred after the alleged misrepresentation, Plaintiff may also assert a claim for the fees which had already been incurred due to the extension of time granted Defendant to pay those fees.

CONCLUSION

For the reasons stated herein, Defendant's motion is denied. A separate order in accordance with this memorandum opinion will be entered.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 25 2017
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No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

v.

R. SCOTT APPLING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT

The court of appeals properly concluded that, because the term "respecting" "is defined broadly as 'with regard or relation to; regarding; concerning,'" "the phrase 'statement *respecting* the debtor's ... financial condition' includes a statement about a single asset." Pet. App. 8a (alteration adopted; quotations omitted). "[A] statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.* Review of that determination is unwarranted.

First, the decision below focused on the role that the term "respecting" plays in the statutory text. Pet. App. 8a. No court of appeals has rejected this argument. Until one does, review is premature.

Second, the lower court's construction of the statute, firmly grounded in the words that Congress actually used, is correct. This Court consistently holds that the word "respecting," like other analogous terms, has a broadening effect on the phrase it modifies. The Court repeatedly rejects arguments, indistinguishable from petitioner's here, that it should disregard these words.

Not only is this construction compelled by the statute's text, but it is "also perfectly sensible." Pet. App. 13a. By subjecting a greater range of debts to the requirements of Section 523(a)(2)(B), this interpretation incentivizes written instruments. That promotes accuracy from the start, and it avoids saddling bankruptcy courts with the burdensome and error-prone task of reconstructing oral conversations that occurred years or decades earlier. This interpretation is also necessary to give effect to Congress's

express goal of safeguarding against certain abusive credit practices.

Third, review is unwarranted because the outcome of this case is very unlikely to turn on the question presented. The court of appeals held that Section 523(a)(2)(B) applies, and thus petitioner's claim fails because the alleged misrepresentations were not made in writing. But, even if Section 523(a)(2)(A) controls instead, petitioner's claim still would fail because it relies on a theory of damages that is contradicted by the common law.

For all of these reasons, review should be denied.

A. Legal background.

The Bankruptcy Code provides a path by which a debtor may have his or her debts discharged and thereby receive "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). But the Code's policy of a fresh start has exceptions.

In particular, 11 U.S.C. § 523(a)(2) exempts from discharge certain debts obtained by fraud:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement

respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

By its terms, subsection (2)(A) applies to all forms of fraud, "other than a statement respecting the debtor's * * * financial condition." Subsection (2)(B), by contrast, applies to a "statement * * * respecting the debtor's * * * financial condition."

Subsection (2)(A) differs from subsection (2)(B) in certain respects. Subsection (2)(A) applies to representations made orally or in writing, and it requires a showing of justifiable reliance. See *Field* v. *Mans*, 516 U.S. 59, 61 (1995). Subsection (2)(B), by contrast, is limited to a "statement in writing," and it requires proof that the creditor "reasonably relied" on that written statement. *Id.* at 65, 66.

B. Factual background.

In 2004, respondent R. Scott Appling purchased a Georgia business that manufactured seating components. Pet. App. 21a. During that transaction, he was defrauded. *Ibid.*

Struggling to keep the business afloat, respondent retained a law firm, petitioner Lamar, Archer & Cofrin, LLP, to seek legal redress from the sellers. Pet. App. 21a. Over the course of the representation, respondent paid significantly more than a hundred thousand dollars in fees. Bankr. Ct. Doc. 66, at 155. Nevertheless, respondent eventually fell behind on his mounting legal bill, and, by March of 2005, he owed petitioner more than $60,000. Pet. App. 21a.

On March 16, 2005, petitioner threatened to terminate its representation due to the outstanding fees. The parties, along with local counsel Walter Gordon, met to discuss the situation on March 18, 2005. Pet. App. 22a.

At the bankruptcy trial—nearly a decade later in September 2014—petitioner and respondent offered different accounts of what was said at this meeting.

Respondent testified that his accountant had told him that he could potentially qualify for a tax refund amounting to $100,000. Bankr. Ct. Doc. 66, at 154. Respondent repeatedly stated that, while he informed petitioner of this conversation, he never made a firm representation as to either the amount of the refund or whether he would pay respondent with the proceeds if he ultimately received less than $100,000.

- "[A]t the time of that meeting, I didn't make a promise, because I couldn't promise what I didn't know I was going to get. It hadn't been done yet." *Ibid.*
- Q: "And you did not make a promise to pay a hundred thousand." A: "No, I did not make a promise." *Id.* at 157.

- "[T]he last thing they asked me, 'Now, you're going to pay us with that money?' I looked at both of them and I said, 'Providing that it's what it's supposed to be. If he gets me a hundred, I'll be able to pay you." *Ibid.*

- "I told Mr. Gordon and Mr. Lamar that I don't know what I'm getting back, there's a potential I get 100,000; if I get 100,000 I should be able to pay your bill." Bankr. Ct. Doc. 69, at 41.

Petitioner, through its managing partner Robert Lamar, testified instead that respondent asserted "that the amended return had been prepared, was ready for filing, and that [respondent] would be getting $100,000 back, which he would use to pay their fees " Pet. App. 53a.

In October of 2005, after the IRS had adjusted his return, Appling ultimately received a tax refund of $59,851, less than $100,000. Pet. App. 22a. The parties met again in November 2005. *Id.* at 22a-23a. Their recollections of this meeting differ once more.

Respondent testified that, during this meeting, he told petitioner that he had received a tax refund, but that he would not use it to pay petitioner:

- "I looked at Bob Lamar and I said, 'Well, if I pay you this money, I go out of business.' * * * So if I keep the money, I'll at least have a chance at making what I got stuck with. And I looked at him and I said, 'So I guess I think you know what my decision is going to be.' And my wife and I stood up and we walked out." Bankr. Ct. Doc. 66, at 172.

- Q: "Your testimony is that you told Mr. Lamar in November 2005 that you had gotten your tax return money back." A: "Absolutely. Without a doubt." Bankr. Ct. Doc. 69, at 31.

See also Pet. App. 56a. Respondent's wife "gave testimony that was generally consistent with [respondent's] version." *Ibid.*

But, on behalf of petitioner, Lamar testified that respondent "represented to [petitioner] he had not yet received his refund, and he would use his refund to pay the outstanding legal fees." Pet. App. 23a. Lamar contended that it was not until June 2006 that petitioner learned that respondent would not use his tax refund to pay petitioner. *Id.* at 57a. As the bankruptcy court noted, the parties' recounting of the decade-old conversation "was very different." *Ibid.*

The litigation subsequently settled. Pet. App. 23a. About six years later, in January 2012, petitioner sued respondent in state court for the unpaid fees. *Ibid.* On October 10, 2012, it obtained judgment for $104,179.60, including the principal and accrued interest. *Ibid.* Three months later, Appling filed for bankruptcy. *Ibid.*

C. Proceedings below.

Petitioner pursued respondent into bankruptcy and initiated an adversary proceeding, seeking to have its entire judgment declared non-dischargeable pursuant to Section 523(a)(2)(A). Pet. App. 23a. Petitioner asserted that respondent made misrepresentations about his expected tax refund during their 2005 meetings, and that petitioner justifiably relied on those misrepresentations in foregoing collection between March 2005 and June 2006. *Id.* at 52a-60a.

1. Respondent moved to dismiss for failure to state a claim. See Pet. App. 67a. He contended that the alleged misrepresentations were "statements respecting [his] financial condition," and thus that they could form the basis for an exemption to discharge only if made in writing, as required by Section 523(a)(2)(B). *Id.* at 70a-76a.

The bankruptcy court disagreed. It concluded that the term "statement respecting * * * financial condition" is limited to "a representation as to" a debtor's "overall financial condition or net worth." Pet. App. 73a. Because the "tax refund" is a representation regarding a "single asset," the court held that it does not qualify. *Ibid.*

Respondent also asserted that petitioner failed to allege actual damages, as required by Section 523(a)(2)(A). Pet. App. 79a-81a. The bankruptcy court, however, held that proof of forbearance on the "collection of the fees" is sufficient. *Id.* at 81a.

The case proceeded to trial in September 2014. Pet. App. 46a. In March 2015, the bankruptcy court made factual findings as to the content of the oral conversations between petitioner and respondent that occurred a full decade earlier, in March and November 2005. *Id.* at 52a-60a. The court noted that, to resolve the factual dispute, it "observed the demeanor of the witnesses." *Id.* at 58a. Ultimately, the court did "not believe the testimony of [respondent] and his wife"; it thus credited petitioner's account. *Ibid.*

The district court revisited and again rejected respondent's argument with respect to damages. Pet. App. 62a-66a. Adopting law decided in the context of Section 523(a)(2)(B), the court held that the petitioner's proof of forbearance was sufficient. *Id.* at 66a.

2. On initial appeal, the district court affirmed. Pet. App. 20a-44a. The court held that a statement describing an individual asset or debt is not a "statement respecting the debtor's * * * financial condition." See *id.* at 24a-30a. The court rested on a construction of the term "financial condition." *Id.* at 28a-29a. The court did not define the word "respecting" or consider its meaning in the statute. *Ibid.*

The court also affirmed as to damages. Pet. App. 41a-44a. Citing two cases decided in the context of Section 523(a)(2)(B), the court concluded that "a creditor need not * * * show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit to establish the debt is nondischargeable." *Id.* at 44a (alteration adopted; quotations omitted).

3. The Eleventh Circuit unanimously reversed. Pet. App. 1a-14a. It held that a statement describing a single asset or debt is a "statement respecting the debtor's * * * financial condition," and thus Section 523(a)(2)(B) governs petitioner's claim. *Id.* at 13a-14a. Because the alleged misrepresentations here were not in writing, petitioner's claim fails. *Ibid.*

The court of appeals reasoned that, although "'financial condition' likely refers to the sum of all assets and liabilities," "it does not follow that the phrase 'statement *respecting* the debtor's ... financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." Pet. App. 8a. Rather, "[r]ead in context," the statutory phrase "includes a statement about a single asset." *Ibid.* Holding otherwise would improperly "read the word 'respecting' out of the statute." *Ibid.*

The court explained that the term "respecting" is "defined broadly as 'with regard or relation to; regarding; concerning." Pet. App. 8a (alteration adopted). Given this plain meaning, "a statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.* The "text," the court concluded, "is not ambiguous." *Id.* at 12a.

The court of appeals added that, beyond being compelled by the text, its construction of the statute is "perfectly sensible" because it "gives creditors an incentive to create writings before the fact" and thus "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." Pet. App. 13a. The court concluded that the writing requirement "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." *Ibid.*

Judge Rosenbaum concurred. Pet. App. 14a-19a. She demonstrated that the court's construction "better promotes congressional intent to give a fresh start to only the 'honest debtor' than does a narrow construction of the same phrase." *Id.* at 14a.

Petitioner did not seek rehearing.

REASONS FOR DENYING THE PETITION

The petition should be denied for at least three reasons: review of the question presented is premature; the decision below is correct; and the question presented does not control the outcome of this case.

A. Review is premature.

Petitioner seeks review of an asserted conflict regarding the meaning of the phrase "statement respecting the debtor's * * * financial condition." Pet.

10-15. Review of this question is premature because no circuit has considered and rejected the argument adopted below. And there is especially good reason to let this issue percolate: this same issue is currently pending in the Fifth Circuit.

In holding that the phrase "statement *respecting* the debtor's ... financial condition" "includes a statement about a single asset," the decision below rested on the plain meaning of the word "respecting." Pet. App. 8a. It acknowledged that the term "financial condition," when standing alone, "likely refers to the sum of all assets and liabilities." *Ibid.* But "'[r]especting' is defined broadly as 'with regard or relation to; regarding; concerning.'" *Ibid.* (alteration adopted). Thus, "a statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.* Construing the term "respecting" was thus crucial.

None of the allegedly conflicting decisions on which petitioner relies gave any consideration to the word "respecting."

Petitioner begins with *Land Investment Club, Inc.* v. *Lauer* (*In re Lauer*), 371 F.3d 406, 413 (8th Cir. 2004). See Pet. 11-12. *Lauer*, however, offered no meaningful construction of the statutory phrase "statement respecting the debtor's * * * financial condition." It did not define *any* term, much less give independent weight to the word "respecting." 371 F.3d at 413-414. And *Lauer* did not announce any clear, broad legal holding of prospective importance.

Lauer is also inapposite because the misrepresentation there was an omission by the debtor. 371 F.3d at 409. The court of appeals here explained that "[S]ection 523(a)(2)(B) requires a 'statement,' as op-

posed to an omission." Pet. App. 11a. Both the Eighth and Eleventh Circuits thus appear to agree that alleged fraudulent omissions are governed exclusively by Section 523(a)(2)(A).

The Tenth Circuit, in *Cadwell* v. *Joelson* (*In re Joelson*), 427 F.3d 700 (10th Cir. 2005), cert. denied 126 S. Ct. 2321 (2006), similarly did not address the meaning of the word "respecting." Instead, the court reasoned that "financial condition" "relates to a debtor's net worth or overall financial condition." *Id.* at 707. The court never considered whether the term "respecting" had impact on the statute's construction.

So too in *Bandi* v. *Becnel* (*In re Bandi*), 683 F.3d 671 (5th Cir. 2012), cert. denied 133 S. Ct. 845 (2013). The court held that the "term 'financial condition' has a readily understood meaning," which is "the general overall financial condition of an entity." *Id.* at 676. But it never considered whether "respecting" effects the proper interpretation of the statutory phrase "statement respecting the debtor's * * * financial condition."

Accordingly, no court has wrestled with the plain meaning of "respecting" and reached the result that petitioner urges. And this Court has consistently denied review of the question presented in the cases preceding this one. Unless and until a sister court of appeals expressly considers and rejects the Eleventh Circuit's reasoning in this case (an outcome we do not anticipate), further review would be premature. Indeed, the lower court's recognition and adoption of a new argument never before considered by the Fifth, Eighth, and Tenth Circuits is precisely the sort of development that the Court should allow to percolate prior to granting review.

Review is especially unwarranted at this time because there is a case pending in the Fifth Circuit that may provide that court an opportunity to revisit *Bandi* in light of the decision below. See *Haler* v. *Boyington Capital Grp., LLC*, No. 17-40229 (5th Cir.). In *Haler*, the lower courts applied *Bandi* to conclude that the debtor's statements regarding single assets were not statements respecting financial condition. See *Haler* v. *Boyington Capital Grp., LLC*, 2017 WL 434357, at *2 (E.D. Tex. 2017). On appeal, the debtor in *Haler* requests that the Fifth Circuit revisit *Bandi* in light of the decision here. See Appellant's Br. at 18-35, *Haler*, 2017 WL 1833075 (5th Cir.) (No. 17-40229).

Before this Court intervenes in this issue, it should await confirmation that a court of appeals will actually reject the analysis adopted below. *Haler* demonstrates that there will be no shortage of vehicles in the event review later becomes appropriate. That is further confirmed by petitioner's assertion that the issue recurs with frequency. Pet. 16-18.

B. The decision below is correct.

Review is also unwarranted because the Eleventh Circuit's interpretation of the statute is correct. That construction is compelled by the plain meaning of the statutory text, the manifest legislative purpose, and the statute's history.

1. The statutory text.

The "interpretation of the Bankruptcy Code starts where all such inquiries must begin: with the language of the statute itself." *Ransom* v. *FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quotations omitted). When, as here, "the statute's language is plain," "that is also where the inquiry should end." *Puerto*

Rico v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quotations omitted).

Petitioner—like the Fifth and the Tenth Circuits—focuses on the term "financial condition." See Pet. 19. See also *Bandi*, 683 F.3d at 674-678; *Joelson*, 427 F.3d at 706-707. Petitioner asserts that the term means "the balance of all of the debtor's assets and liabilities." Pet. 19. The Fifth Circuit likewise held that the term "financial condition" must refer to "the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities." *Bandi*, 683 F.3d at 676. See also *Joelson*, 427 F.3d at 706-707.

This analysis, however, fails to account for the whole statute, especially the word "respecting." As the Eleventh Circuit below recognized, "even if 'financial condition' means the sum of all assets and liabilities, it does not follow that the phrase 'statement *respecting* the debtor's ... financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." Pet. App. 8a. When "[r]ead in context, the phrase 'statement *respecting* the debtor's ... financial condition' includes a statement about a single asset." *Ibid.* A conclusion otherwise would "read the word 'respecting' out of the statute." *Ibid.*

To begin with, there is a "duty to give effect, where possible, to every word of a statute," particularly when the word "occupies so pivotal a place in the statutory scheme." *Duncan* v. *Walker*, 533 U.S. 167, 167, 168 (2001). Here, that obligates the Court to give effect to the word "respecting." Congress could have written the statute to turn on a "statement *of* financial condition" or "statement *describing* financial condition." Its decision to use the term "respect-

ing"—a word with long-recognized meaning—cannot be considered accidental.

As petitioner appears to recognize (Pet. 19-20), the word "respecting" means "with regard or relation to: regarding, concerning." *Webster's Third New International Dictionary* 1934 (1981). See also *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967) ("concerning; about; regarding; in regard to; relating to"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 649 (1989) (Stevens, J., concurring in part, dissenting in part) (interpreting "respecting" to mean "concerning, or with reference to").

In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), the Court construed the First Amendment clause that there "should be 'no law respecting an establishment of religion.'" As the Court explained, "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization." *Ibid.* Thus, in the context of the Religion Clause, "[a] given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Ibid.* Likewise, in *Presley* v. *Etowah County Commission*, 502 U.S. 491, 506, (1992), the Court interpreted the cognate "with respect to" to mean "direct relation to, or impact on."

Given this definition, the phrase "statement respecting * * * financial condition" has a straightforward meaning. It captures any statement that has a "direct relation to" or an "impact on" (*Presley*, 502 U.S. at 506) the "balance of all of the debtor's assets and liabilities." Pet. 19.

Contrary to petitioner's assertion (Pet. 20), the practical implications of this construction are anything but "indeterminate." As petitioner sees it, a "financial condition" is the "sum" of the debtor's assets and liabilities. Pet. 19 (citing 11 U.S.C. § 101(32)(A)). Petitioner even provides a formula to calculate the debtor's "financial condition"—"the equality of total assets to total liabilities plus net worth." *Ibid.* Our argument—adopted by the court of appeals—is that a statement describing one of the constituent elements that is summed together counts as a "statement *respecting* * * * financial condition." Pet. App. 9a. Thus, a "statement about a single asset is still a statement *respecting* a debtor's financial condition." *Ibid.*[1]

Petitioner, by contrast, fails to ascribe any meaning to the term "respecting." Pet. 20-21. Despite recognizing that the term "has breadth in the abstract" (Pet. 20), petitioner offers no explanation for what work the word does in the statute. In fact, petitioner appears to recognize that it seeks an atextual interpretation, framing its argument in the main as one

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[1] For this reason, petitioner is wrong to assert that the court of appeals' construction would render "virtually every statement" one that is "respecting * * * financial condition" and thus covered by subsection (2)(B) rather than subsection (2)(A). Pet. 22. As the Eleventh Circuit held, under its constriction, "Section 523(a)(2)(A) covers most fraud." Pet. App. 11a-12a. Referencing case law of the Fourth Circuit—where this construction has governed for more than three decades—the court of appeals recognized "a list of examples" of debts "incurred by an oral misrepresentation that [are] not 'respecting the debtor's financial condition'" and thus were "nondischargeable under subsection (A)." *Id.* at 12a. This includes "false representations about job qualifications and lies about the purpose and recipient of a payment." *Ibid.*

driven by policy concerns that, in its view, would sway "[e]ven the most ardent textualists." Pet. 22. Petitioner's failure to wrestle with the word "respecting" is hardly surprising—neither the Fifth nor the Tenth Circuits gave any meaning to the word, either.

Petitioner instead asserts that the term "respecting" should be disregarded because applying its established definition to the phrase "statement respecting * * * financial condition" would "override or change the meaning of 'financial condition.'" Pet. 20. This argument is difficult to understand. Of course one word or phrase in a statute may "override or change the meaning of" another word—that is often the very purpose of prepositions, adjectives, adverbs, and a host of other linguistic devices. The task here is to interpret the meaning of the entire phrase that Congress enacted—"statement respecting the debtor's * * * financial condition." It is no answer to define what "financial condition" means when standing alone, and then close one's eyes to the remainder of the statutory language.

Indeed, the Court has repeatedly rejected efforts—like petitioner's argument here—to disregard Congress's use of prepositions with "breadth in the abstract." Pet. 20. In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (emphasis added), the Court considered the Airline Deregulation Act (ADA), which preempts state laws "*relating to* rates, routes, or services of any air carrier."[2] Seeking

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[2] In the court of appeals, petitioner conceded that "relating" would have "identical effect" to the term "respecting." Pet. C.A. Br. 22. That concession is well-founded, as they are synonyms. See *Respecting*, *Webster's Third New International Dictionary* 1934 (1981).

to regulate airline advertising, the states argued that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." *Morales*, 504 U.S. at 385. The Court rejected that contention because it "simply reads the words 'relating to' out of the statute." *Ibid.* "[T]he key phrase, obviously, is 'relating to.'" *Id.* at 383. Any state law that has "a significant impact upon" airlines rates, the Court concluded, "relates to" those rates and is thus preempted. *Id.* at 389, 390. Of course, not *everything* can be said to relate to airline rates: if the connection is "too tenuous, remote, or peripheral," then it does not "relate to" airline rates and thus there is no preemption. *Id.* at 388, 390.

Morales relied, in part, on the Court's ERISA jurisprudence, which also uses the term "relating to." *Id.* at 383-384. In that context, the Court has repeatedly explained the importance of the term, calling statutes using this preposition "deliberately expansive" (*Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987)), "broadly worded" (*Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990)), "conspicuous for its breadth" (*FMC Corp.* v. *Holliday*, 498 U.S. 52, 58 (1990)), and evincing an "expansive sweep" (*Pilot Life Ins. Co.*, 481 U.S. at 47).

Petitioner also invokes a supposed canon of construction that "the Court's typical practice is '[to] read the exception narrowly in order to preserve the primary operation of the provision.'" Pet. 21. Thus, petitioner contends that subsection (2)(B), as an exception to (2)(A), should be construed narrowly. *Ibid.* This gets it precisely backwards because subsection (2)(A) is *itself* an exception to the Bankruptcy Code's broad policy of discharge. Section 523(a)(2)(A) is thus narrowly construed, consistent with the "the long-

standing principle that exceptions to discharge should be confined to those plainly expressed." *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (quotations omitted).[3] Subsection (2)(B) is, by contrast, an exception-to-the-exception.

Because petitioner's argument rests on an atextual construction that asks the Court to disregard Congress's use of the term "respecting," review is unwarranted. And, as we said earlier, review should certainly wait until other courts of appeals have opportunity to opine on the meaning of the term "respecting" as used in this statute.

2. The legislative purpose.

The legislative purpose confirms the conclusion that "statement respecting the debtor's * * * financial condition" encompasses statements describing a single asset or debt. This construction promotes predictability and accuracy while protecting honest debtors from abusive credit practices. Petitioner's interpretation of the statute would, by contrast, frustrate Congress's express goals.

a. The Eleventh Circuit's construction of the statutory phrase "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." Pet. App. 13a.

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[3] Petitioner asserts—and will undoubtedly reiterate in reply—that the Court sometimes qualifies its statements regarding the policy underlying bankruptcy discharge as providing opportunity for the "honest but unfortunate debtor." *Local Loan*, 292 U.S. at 244. But, as Judge Rosenbaum's concurring opinion underscores, the court of appeals' construction "better promotes congressional intent to give a fresh start to only the 'honest debtor.'" Pet. App. 14a. See also *infra*, 21-24.

Congress "designed" the Bankruptcy Code to provide "predictability" in bankruptcy proceedings. *Schwab* v. *Reilly*, 560 U.S. 770, 790 (2010). Because "[p]ractical, economical and expeditious administration and the avoidance of unnecessary and costly litigation" is an important goal (*Cent. Tr. Co.* v. *Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 361 n.3 (1982) (Stevens, J., dissenting)), the Court should favor interpretations of the Bankruptcy Code that "enhance[] predictability for interested parties." *Mwangi* v. *Wells Fargo Bank, N.A.* (*In re Mwangi*), 764 F.3d 1168, 1176 n.4 (9th Cir. 2014).

Interpreting the phrase "statement respecting financial condition" to encompass statements about single assets and debts has the effect of placing more representations in the category of Section 523(a)(2)(B), which requires written representations—and concomitantly fewer representations in the category of Section 523(a)(2)(A), which applies to written and oral statements alike. Thus, this interpretation encourages creditors to rely on written statements. This furthers accuracy and predictability in two main ways.

First, written statements are typically more reliable. See *Joelson*, 427 F.3d at 707 (observing that an oral statement "is often informal and spontaneous" and thus more likely to be unreliable). When a debtor is required to commit a representation to writing—and often must sign that instrument—a debtor will typically be more precise and complete in his or her representations. As the court of appeals explained, "providing an incentive for creditors to receive statements in writing may reduce the incidence of fraud." Pet. App. 13a-14a.

Second, written statements create a record that permits predictable and efficient dispute resolution. In the course of a bankruptcy, parties often dispute the particulars of transactions that occurred years—if not decades—earlier. The malleability of oral representations makes dispute resolution so far removed in time exceedingly burdensome and error-prone.

Here, for example, the bankruptcy court heard conflicting testimony in September 2014 about oral statements made nearly a decade earlier, in March 2005. See Pet. App. 2a-3a. The parties vigorously disputed who said what ten years prior. See, *supra*, 4-6. To resolve the dispute, the bankruptcy court resorted to the "demeanor of the witnesses," its own back-of-the-envelope financial calculations, and its intuition about respondent's motivation for seeking bankruptcy advice. Pet. App. 58a. Such archeology is a fraught enterprise: not only do memories fade with time, but debtors and creditors will have drastically different incentives that will inevitably color their recollections.

Congress created a simple solution. If a creditor wishes to rely on a statement respecting the debtor's finances as a basis to later seek an exemption from bankruptcy discharge, that statement must be made in writing. Then, if a debtor declares bankruptcy years (or decades) later, there can be no dispute as to the content of the statement itself.

As the Eleventh Circuit observed, "the requirement of a writing is not at all unusual in the history of the law." Pet. App. 13a. "From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief." *Ibid.* While "[t]his require-

ment may seem harsh after the fact," "it gives creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision" *Ibid.*

Petitioner, as it did below, fears that this creates a "loophole" in the scope of Section 523(a)(2)(A). Pet. 21-22. Not so. "[A] lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit." Pet. App. 13a. That is particularly true here because "[petitioner], a law firm, could have required [respondent] to put his promise * * * in writing." *Ibid.* The writing requirement is thus "perfectly sensible." *Ibid.*

At bottom, the broad construction "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." Pet. App. 13a.

b. Separately, as Judge Rosenbaum's concurring opinion demonstrates, the broad construction "better promotes congressional intent to give a fresh start to only the 'honest debtor.'" Pet. App. 14a.

As petitioner appears to recognize (Pet. 22), Congress enacted safeguards in Section 523(a)(2)(B) to bar predatory practices by some abusive creditors. Congress sought to stem "the peculiar potential of financial statements to be misused not just by debtors, but by creditors who know their bankruptcy law." *Field*, 516 U.S. at 76. It sought to "moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies." *Ibid.*

Congress detailed the kind of improper practices it sought to eliminate. Creditors "sometimes have encouraged * * * falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76-77. In particular, Congress recognized the "frequent practice for consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding." *Id.* at 77 n.13 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 130-131, 1978 U.S.C.C.A.N. 5787, 6091 (1977)). Unsavory creditors provided forms that had "too little space for a complete list of debts." *Ibid.* The loan applicant may have been "instructed by a loan officer to list only a few or only the most important of his debts." *Ibid.* But, on "the bottom of the form, the phrase 'I have no other debts' is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting." *Ibid.*

To stop these practices, Congress crafted the safeguards contained in Section 523(a)(2)(B). In order to use information a debtor supplies "respecting" his or her "financial condition" as a later basis to exempt debt from discharge, a creditor must obtain that information in writing (11 U.S.C. § 523(a)(2)(B)), and it must prove that it "reasonably" relied on the representation (*id.* § 523(a)(2)(B)(iii)). The written requirement creates accuracy from the start and prevents abuse at the end (see, *supra*, 18-21), while the reasonable reliance requirement precludes creditors from seeking an exemption from discharge when a creditor made an obvious misstatement, on which no reasonable creditor would rely.

Interpreting "statement respecting financial condition" to include statements describing single debts

or assets ensures that a greater range of representations are protected by Section 523(a)(2)(B)—the precise result that Congress intended. Pet. App. 18a-19a (Rosenbaum, J., concurring).

Petitioner appears to recognize all of this, but nonetheless asserts that the construction below "expands the scope of the 'financial condition' exception far beyond the particular problem targeted by Congress." Pet. 22-23. That is wrong for at least two reasons.

First, the very abusive practice Congress identified—where a debtor is asked to list some outstanding debts (H.R. Rep. No. 595, 95th Cong., 1st Sess. 130-131)—is captured only by the construction of the phrase we urge. A list of the borrower's *debts* typically does not reveal her "*overall* financial condition," because it says nothing about her assets or income. Thus, petitioner's argument yields the dubious result where the example that Congress provided as the justification for the statute is excluded from what qualifies as a "statement respecting the debtor's * * * financial condition."

Second, petitioner's construction would render subsection (2)(B) a porous statute that would fail to protect debtors in the way that Congress intended. Under petitioner's interpretation, a creditor could carefully tailor its questions to ask a debtor everything *but* her ultimate net worth. Through such gerrymandering, any institutional creditor could purposefully skirt the safeguards that Congress put in place. That is not the law Congress wrote. By using the word "respecting," Congress sought to apply the protections of Section 523(a)(2)(B) to all debtor representations relating to financial conditions—and to

preclude creditors from circumventing those safeguards.

Concurring below, Judge Rosenbaum debunked petitioner's assertion that its construction would further the policy of protecting the "honest but unfortunate debtor." Pet. 21. "Though a narrow construction of the phrase in subsection (A) seems to further congressional intent to protect only the 'honest debtor,'" Judge Rosenbaum explained that "[s]ometimes things are not as they seem." Pet. App. 14a. Rather, "a broad interpretation of the phrase in subsection (B) better comports with congressional intent." Pet. App. 14a-15a. That is because "the reality is that a broad construction of the phrase 'statement respecting ... the debtor's financial condition' in subsection (B) advances congressional intent to provide relief for only the 'honest debtor' more than a narrow interpretation of the same phrase in subsection (A)." *Id.* at 15a.

3. The statutory history.

Finally, the statutory history confirms that a debtor's representation regarding a single asset or debt qualifies as a "statement respecting financial condition."

Congress recodified the Bankruptcy Code in 1978 to create the current version of Section 523(a)(2). See Pub. L. No. 95-598, 92 Stat. 2549 (1978). But the term "statement respecting financial condition" dates significantly earlier.

In 1926, Congress amended what was then Section 14b(3) of the Bankruptcy Code. See Act of May 27, 1926, § 6, 44 Stat. 662, 663. That newly-amended provision barred debtors from obtaining a bankruptcy discharge at all if they had "[o]btained money or

property on credit * * * by making or publishing * * * a materially false statement in writing respecting his financial condition." 11 U.S.C. § 32b(3) (1926).

In 1960, Congress further amended the statute. Rather than serve as a complete bar to discharge, the amended statute provided that a debtor could not discharge those liabilities obtained by "reliance upon a materially false statement in writing respecting his financial condition." See Pub. L. No. 86-622, 74 Stat. 409 (1960).

So far as we are aware, courts *uniformly* understood this language in the 1926 and the 1960 Acts to encompass a debtor's representations regarding a single asset or debt.

For example, in 1945, the Sixth Circuit construed the statute precisely as the Eleventh Circuit did here. "No cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities." *Albinak* v. *Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945). The court rejected the contention that the relevant phrase narrowly encompasses only "a complete statement of assets and liabilities by which the precise financial worth of the person making the statement can be determined." *Ibid.* "[T]he statute does not use the phrase 'financial statement.'" *Ibid.*

In 1967, the Eighth Circuit reached the same conclusion. It found that "[a] written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation." *Shainman* v. *Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967). The court reasoned that "[t]here is

nothing in the language or legislative history of this section of the Act to indicate that it was intended to apply only to complete financial statements in the accounting sense." *Ibid.*

A Louisiana appellate court agreed. "The bankruptcy act does not speak of a 'financial statement' in the sense of a formal listing and detailing of assets and liabilities." *Dial Fin. Co.* v. *Duthu*, 188 So. 2d 151, 154 (La. Ct. App. 1966). "Insofar as concerns the Federal Bankruptcy Act a 'statement in writing respecting his financial condition' means any written reference to the assets or liabilities of the debtor." *Ibid.* That a statement describing an asset or debt "is not a part of a complete listing of assets and liabilities is immaterial." *Ibid.*

For decades, courts held similarly. See, *e.g.*, *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356, 1357-1358 (9th Cir. 1977) (concluding that an individual deed—despite saying nothing about a debtor's liabilities or overall net worth—qualified as a "statement * * * respecting * * * financial condition"); *In re Butler*, 425 F.2d 47, 49 (3d Cir. 1970) (holding that a corporation's false statements as to select accounts receivable qualified as "statements * * * respecting * * * financial condition").

When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)). Indeed, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it

re-enacts a statute without change." *Lorillard*, 434 U.S. at 580.

That presumption takes on special force here, where the history indicates Congress acted with express intent to codify pre-existing law. The Report of the House Committee on the Judiciary noted that "[Section] 523(a)(2)(A) and (B) was 'modified only slightly' from its predecessor, and none of the modifications noted by the Committee impact the meaning of 'respecting the debtor's ... financial condition.'" *Joelson*, 427 F.3d at 709 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 364). See also S. Rep. No. 989, 95th Cong., 2d Sess. 78 (1978). And a member of the House introduced the amendment by stating that it "is intended to codify current case law." *Joelson*, 427 F.3d at 709 (quoting 124 Cong. Rec. H11089 (Sept. 28, 1978) (statement of the Hon. Don Edwards)).

At the time Congress enacted Section 523(a)(2), the phrase "statement respecting * * * financial condition" had long been interpreted to include statements describing a single asset or debt. Congress's retention of this language is thus ratification of the consistent construction.

C. This is a poor vehicle for review.

This case is a poor vehicle for review because resolution of the question presented is unlikely to have any bearing on its ultimate outcome.

Petitioner seeks to have its claim governed by Section 523(a)(2)(A). If Section 523(a)(2)(A) did apply, respondent would nonetheless prevail because petitioner has failed to prove the necessary element of damages. See Resp. C.A. Br. 29-33; Resp. C.A. Reply Br. 21-29.

Section 523(a)(2)(A) "incorporate[s] the general common law of torts." *Field*, 516 U.S. at 70 n.9. One such element is proof of "pecuniary loss resulting from" the misrepresentation. Restatement (Second) of Torts § 537 (1977). See also *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996).

Here, the debt at issue is money that respondent owed petitioner *prior to* respondent's making of the representations at issue. See Pet. 4-5. The record demonstrates that petitioner "extended no new net value after [respondent's] false statement in March 2005." Pet. App. 43a. In fact, petitioner, via its managing partner, *admitted* as much. Bankr. Ct. Doc. 66, at 100 (testimony of Robert Lamar that, after the March 2005 meeting, "we worked for 20-something thousand, we got paid 25,000 and the debt that was sitting out there accruing interest was not getting reduced at all for that period of time"). Thus, new money was not lent in reliance on respondent's asserted statements. At most, petitioner agreed to forbear on its collection efforts.

To be clear, we do not dispute that a creditor's decision to forbear on debt collection can establish an actionable claim of damages for subsection (2)(A). But, to substantiate such a theory, the creditor must prove that (1) "it had valuable collection remedies at the time of the misrepresentation," (2) "it did not exercise those remedies based upon the misrepresentation," and (3) "that the remedies lost value during the extension period." *Ojeda* v. *Goldberg*, 599 F.3d 712, 719 (7th Cir. 2010). See also *In re Kim*, 163 B.R. 157, 161 (B.A.P. 9th Cir. 1994), *adopted by In re Kim*, 62 F.3d 1511 (9th Cir. 1995); *Shah* v. *Chowdaury* (*In re Chowdaury*), 2014 WL 2938274, at *4 (B.A.P. 9th

Cir. 2014); *Locke* v. *Milner* (*In re Locke*), 205 B.R. 592, 598 (B.A.P. 9th Cir. 1996).

Here, however, petitioner never argued—much less proved—that it had valuable collection remedies in March or November 2005 or that those remedies lost value during the period of forbearance. Instead, petitioner argued—and the bankruptcy court agreed—that "'[a] creditor need not also show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit' to establish the debt is nondischargeable." Pet. App. 44a. See also Pet. App. 64a-66a, 80a-81a.

To arrive at that conclusion, the bankruptcy court rested on two decisions—*Wolf* v. *Campbell* (*In re Campbell*), 159 F.3d 963, 966 (6th Cir. 1998), and *Shawmut Bank, N.A.* v. *Goodrich* (*In re Goodrich*), 999 F.2d 22, 25 (1st Cir. 1993). But those cases arose in the context of Section 523(a)(2)(B)—and they are obviously inapplicable if petitioner's argument is one pursuant to Section 523(a)(2)(A).

In *Goodrich*, the First Circuit reasoned that Section 523(a)(2)(B) "is quite detailed in its conditions for nondischargeability." 999 F.2d at 25. Since "Congress enacted a detailed statute without an explicit damage requirement," the Court concluded that Section 523(a)(2)(B) does not require proof of damages. *Id.* at 26. "Had Congress wished to add 'damage' as an element, it could easily have done so." *Id.* at 25. The Sixth Circuit later agreed. *Campbell*, 159 F.3d at 967.[4]

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[4] There is a circuit split on this issue in the context of subsection (2)(B). The Ninth Circuit, along with other courts, has held that proof of damages is a necessary element for that subsec-

Whatever force this reasoning has with respect to subsection (2)(B), it clearly does not apply to subsection (2)(A), which does not enumerate its elements. Subsection (2)(A) instead "incorporate[s] the general common law of torts" (*Field*, 516 U.S. at 70 n.9), which includes proof of damages. The bankruptcy's decision to the contrary is blatant error. Petitioner's failure to prove up its damages thus forecloses its claim, even if governed—as petitioner argues here—by Section 523(a)(2)(A).

Because petitioner's claim fails regardless whether it is controlled by Section 523(a)(2)(A) or Section 523(a)(2)(B), further review is unwarranted.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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MAY 2017

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tion. See *Siriani* v. *Nw. Nat'l Ins. Co.* (*In re Siriani*), 967 F.2d 302, 305 (9th Cir. 1992).

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No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

In the published decision below, the Eleventh Circuit expressly acknowledged a circuit split on an important, frequently recurring question of bankruptcy law—namely, "Can a [false] statement about a single asset be a 'statement respecting the debtor's ... financial condition,'" under 11 U.S.C. § 523(a)(2). Pet. App. 1a-2a. The court of appeals then deepened that split by directly answering that question in the affirmative, such that a debt obtained on the basis of such a fraudulent statement is dischargeable in bankruptcy unless it meets the requirements of Section 523(a)(2)(B). *See id.* at 8a-9a. And the Eleventh Circuit reversed the district court on that basis alone, holding that Appling's debt to Lamar was dischargeable, even though it was obtained by fraud, because Appling's false statements were oral, not written. *Id.* at 14a.

In response, Appling does not deny the existence of that square circuit split. *See* Pet. 10-15. He does not dispute that the question recurs frequently in bankruptcy courts across the country. *See id.* at 16-18. He does not contest the importance of the question or the need for uniformity—on this specific question or in bankruptcy law generally. *See id.* at 15-16. He does not deny that the question is squarely presented in this case, nor offer any reason why, if the Court grants review, it could not definitely resolve it. *See id.* at 18.

Instead, Appling devotes a full 70% of his "Reasons for Denying the Petition" to arguing that "[t]he decision below is correct." Opp. 12-27. The merits of the question presented, however, are for plenary review—*after* this grants certiorari. And what remains is a strained attempt to argue that review of

an acknowledged, three-to-two circuit conflict is "premature" (*id.* at 9-12) and that, notwithstanding all of the above, this case is a "poor vehicle" (*id.* at 27-30) to decide the issue. Neither argument is remotely persuasive.

All the core criteria for certiorari are met, and Appling has effectively conceded as much. The petition for a writ of certiorari should be granted.

A. There Is No Reason To Allow The Circuit Conflict To Persist Any Longer

Five Circuits have weighed in on the question presented, dividing three-to-two with published decisions on both sides of the issue. *See* Pet. 10-14. Appling nevertheless contends (at 9-12) that review of the question presented is "premature," because no court of appeals has considered and rejected his argument about the significance of the term "respecting" in Section 523(a)(2). Importantly, he does not deny that both the result and holding of the decision below is irreconciliable with the results and holdings of, at least, two other court of appeals decisions (and countless bankruptcy court decisions).[1] He contends only that the Court should wait for the Fifth Circuit (or some other Circuit) to expressly reject the Eleventh Circuit's *reasoning*. It should not.

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[1] Appling argues (at 10-11) that the Eighth Circuit's decision in *In re Lauer*, 371 F.3d 406 (8th Cir. 2004), is "inapposite" because it concerned a material *omission*, not a false *statement*. But the distinction between a false statement "respecting the debtor's financial condition" and a material omission "respecting the debtor's financial condition" itself appears only in the decision below. Neither the Eighth Circuit nor any other Circuit has relied on that distinction.

First, it is simply not true that "no court has wrestled with the plain meaning of 'respecting' and reached the result that petitioner urges." Opp. 11. Every one of the courts of appeals to adopt the majority position has considered and interpreted the same, concise statutory phrase—a "statement respecting the debtor's . . . financial condition." *See In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 845 (2013); *In re Joelson*, 427 F.3d 700, 705 (10th Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006); *In re Lauer*, 371 F.3d at 413. It would be surprising—to say the least—if those courts all somehow overlooked the preposition smack-dab in the middle of that phrase. And, in fact, they did not. *See, e.g., In re Bandi*, 683 F.3d at 677 ("The Tenth Circuit held that none of the debtor's statements pertained to her 'overall financial health' and that they were not statements 'respecting' her 'financial condition' within the meaning of § 523(a)(2)(A). . . . We agree."); *In re Joelson*, 427 F.3d at 706 ("[O]ur legal interpretation of the scope of the phrase 'respecting the debtor's . . . financial condition' will determine the outcome of this case.").

Nor is Appling the first debtor to attempt to evade his fraudulent debt on the basis of the word "respecting" (though, admittedly, no one else seems to have relied on that word so heavily and divorced from context). *See, e.g., In re Joelson* Appellants' Br. 7-8 (10th Cir. Aug. 31, 2004) (arguing that, although his false statement was "[c]oncededly . . . not a formal financial statement in the ordinary usage of that phrase," Congress "referred to a much broader class of statements—those 'respecting the debtor's . . . financial condition'"). What Appling calls ignoring the word is just the courts construing it in the context of the rest of

the provision and of the statute as a whole—and their declining to imbue the word with the same talismanic significance as Appling and the decision below. In any event, the conflict is not over the meaning of "respecting"; it is over, as Appling himself has put it, "the meaning of the entire phrase that Congress enacted—'statement respecting the debtor's ... financial condition.'" Opp. 16.

Second, there is no reason for this Court to wait—in all likelihood for a year or longer—to see what happens in *In re Haler*, No. 17-40229 (5th Cir.), a case in which the briefing is not even complete. Opp. 12. There is no guarantee that the Fifth Circuit's resolution of that appeal will shed any additional light on the question presented or that the case will reach this Court even if it did. Indeed, the debtor's *principal* argument before the Fifth Circuit in *In re Haler* is that the false statements at issue in that case *did* "purport to present a picture of the debtor's overall financial health," such that they would be subject to the requirements of Section 523(a)(2)(B) under *either* side of the split. *See Haler* Appellant's Br. 13-18 (May 1, 2017) (quoting *In re Bandi*, 683 F.3d at 677).

Moreover, even if the Fifth Circuit reaches the debtor's alternative argument concerning the meaning of Section 523(a)(2), it is unlikely that the panel (which will be bound by the Fifth Circuit's prior decision in *In re Bandi*) will address the Eleventh Circuit's reasoning at all. More likely, it will simply note that existing precedent by which it is bound resolves the issue. And there is no reason to think that the Fifth Circuit as a whole would see fit to take the case *en banc* just to consider whether it should switch sides of a circuit split that will persist either way. That is particularly true

given that Judge Owen's decision in *In re Bandi* carefully—and persuasively—considered the issue.

At the same time, denying review here, in the case actually before this Court, would impose a considerable cost. Ordinarily, the existence of an acknowledged circuit conflict on an important and recurring issue would be a sufficient reason to grant certiorari. But the constitutional interest in establishing a "uniform" law of bankruptcy makes granting review here and now all the more imperative. *See* Pet. 16.[2]

B. This Case Is The Ideal Vehicle To Resolve The Circuit Conflict

Reaching even further, Appling also suggests (at 27) that this case is "a poor vehicle for review because resolution of the question presented is unlikely to have any bearing on its ultimate outcome." Even if the Eleventh Circuit's decision is reversed on the question presented, he says, he is likely to prevail on remand because Lamar supposedly cannot prove that it lost "valuable collection remedies" when it relied on Appling's false statements. Opp. 28 (quoting *Ojeda v. Goldberg*, 599 F.3d 712, 719 (7th Cir. 2010)). This argument is just grasping for straws.

To begin with, this is not really a "vehicle" argument at all. Appling is *not* arguing that there is any possible impediment to the Court reaching and resolving the question in this case, and there is none.

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[2] Nor is there any reason to assume that another case presenting this issue will come to this Court any time soon. Although the question presented arises frequently in bankruptcy courts, the debts involved in these cases are often relatively small, making it less likely that the parties would invest in the expense of litigating the issue all the way to this Court.

His damages argument does not need to be addressed before resolving the question presented—as evidenced by the fact that the Eleventh Circuit did not address it. And because it did not, there is no reason for the Court to do so in the first instance. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view . . . ."). Appling's "vehicle" argument fails for this reason alone.

The fact that a party might attempt to advance a *different* argument on a *different* question on *remand* from this Court is no basis for denying certiorari on a question that, as here, is squarely presented. Indeed, the Court granted review (and reversed) just last Term in a case presenting an unrelated circuit split on the meaning of Section 523(a)(2) of the Bankruptcy Code, even though the respondent there made the same argument in opposing review. *See* Opp. 24, *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016) (No. 15-145) (arguing that "this Court's review also [wa]s not warranted because even if this Court were to disagree [as] to the correct interpretation of section 523(a)(2)(A), that still would not change the ultimate outcome of this case" based on alternative arguments not passed upon by the court of appeals).

Moreover, it is not remotely "obvious[]" that Appling would prevail on his alternative argument on remand. Opp. 29. To the contrary, the two courts below that reached this argument roundly rejected it—and granted judgment for Lamar. *See* Pet. App. 41a-44a (district court), 62a-66a (bankruptcy court).

Appling faults (at 29) the bankruptcy court for relying on cases interpreting Section 523(a)(2)(B), not Section 523(a)(2)(A). But the Sixth Circuit's reasoning in *In re Campbell*, 159 F.3d 963 (6th Cir. 1998), applies

equally to Section 523(a)(2)(A). *See id.* at 967 (refusing to require creditors to prove the loss of a valuable collection remedy because it "would create a perverse incentive for insolvent debtors to lie to creditors to get them to forbear collection of past due indebtedness .... A borrower's incentive to act with integrity should not end once he becomes insolvent.").

In any event, the bankruptcy court found that, by the time of the November 2005 meeting, Appling had recently received a tax refund of $59,851—approximately what Appling then owed Lamar. *See* Pet. App. 48a-49a. Yet Lamar did not attempt to collect that money based on Appling's false representations at that meeting, and Appling subsequently used it to pay other business expenses, instead of paying Lamar. *See id.* at 55a-60a. To the extent Lamar has to prove on remand that it lost a valuable collection remedy based on Appling's false statements, the record fully supports it. *See Ojeda*, 599 F.3d at 720 ("Had [the creditor] chosen to collect on the loan, she would have been entitled to the full amount. Because she instead chose to forbear on the entire loan, we find that same amount non-dischargeable.").

None of this, however, takes anything away from the fact that this case is an ideal vehicle, in the sense that matters in deciding whether to grant certiorari. To date, the entire case has depended on the last court's view of the question presented. The district court and bankruptcy court adopted the majority position on the meaning of Section 523(a)(2) and resolved the case in Lamar's favor; the Eleventh Circuit adopted the minority view on the meaning of that provision and reversed. In short, the question presented has been outcome determinative.

C. Appling's Merits Arguments Do Not Undermine The Case For Certiorari

While Appling's experienced counsel makes a stab at arguing the case is not certworthy—at least invoking buzzwords like "premature" and "vehicle"—the bulk of the response just argues (at 12-27) the merits of the question presented. The merits are, of course, for the next stage of this case, if the Court grants plenary review—and not a reason to avoid such review. That is particularly true where, as here, the decision below adopted the *minority* position among the courts of appeals. Should the Court grant the petition for certiorari, we will respond in kind to Appling's merits arguments in our actual merits briefs. For now, it suffices to make a few points.

First, it is clear, based even on the cert-stage briefs, that the parties, both represented by experienced counsel, have starkly different positions on the meaning of the statutory provision at issue. That only bolsters the case for certiorari by ensuring that, if this Court grants review, the issue will be fully ventilated on both sides.

Second, as far as our position is concerned, Lamar does not, as Appling suggests, seek "an atextual interpretation" of Section 523(a)(2) or argue that the term "respecting" should be "disregarded." Opp. 15-16. We wholeheartedly urge the Court to read the statute. Rather, our point is that the word "respecting" must be read in context of the provision as a whole. In keeping with this Court's guidance on similar prepositional phrases, it should not be interpreted "to the furthest stretch of its indeterminacy," *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), so as to

render the term "financial condition"—or, indeed, Section 523(a)(2)(A) as a whole—largely inoperative. That, in itself, is a compelling textual reason to reject Appling's interpretation. *See* Pet. 18-20.

Third, try as he might, Appling cannot paper over the unappealing consequences of his interpretation. *See* Pet. 21-22. That Appling's vision is, in fact, to subject nearly all fraudulent debts to the heightened standards of nondischargeability in Section 523(a)(2)(B) is made clear by his legislative purpose arguments. *See* Opp. 18-24. All of his purported legislative purposes—encouraging creditors to rely on written statements, creating a record for more efficient dispute resolution, and, most transparently, "ensur[ing] that a greater range of representations are protected by Section 523(a)(2)(B)," Opp. 22-23—would be best served by eliminating Section 523(a)(2)(A) altogether.

But, as we explained in the petition (at 21-22), Section 523(a)(2)(A) gives effect to one of oldest and most fundamental purposes of bankruptcy law—to extend the law's protection only to the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). As both the district court and bankruptcy court found, whatever else is true, Appling was *not* an honest debtor. *See* Pet. App. 31a-38a, 52a-60a.[3] It is simply undeniable that exempting large swaths of debts obtained by false oral (instead of

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[3] Appling recounts his own version of events (at 4-6), but the bankruptcy court rejected that account. *See* Pet. App. 52a-60a.

written) statements, like Appling's, severely undermines this central object of the Code.[4]

Finally, the statutory history plainly supports Lamar's reading of the text. *See* Pet. 22-23; *In re Joelson*, 427 F.3d at 707-10. And, notwithstanding Appling's selective quotations from a handful of lower court decisions, Appling's expansive understanding of the congressional intent behind the financial-condition exception is difficult to square with this Court's view in *Field v. Mans*, 516 U.S. 59, 76-77 (1995), that in fact Congress sought to do in the 1960 amendments was to "moderate the burden on individuals who submitted false financial statements" based on specific tactics of certain dishonest consumer financial services companies, not create a massive loophole through which dishonest debtors could discharge their debts to honest creditors obtained by oral fraud.

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[4] Judge Rosenbaum acknowledged that the Eleventh Circuit's interpretation of a statement "respecting the debtor's . . . financial condition" will result in more discharges of debts obtained by *oral* false statements, as the scope of Section 523(a)(2)(A) narrows. Pet. App. 14a, 18a. But, she argued, it will concommitantly result in fewer discharges of debts obtained by *written* false statements, as the scope of Section 523(a)(2)(B) expands. *Id.* at 18a. That view is mistaken. Section 523(a)(2)(B) simply bars the discharge of a subset of debts that would otherwise be barred by Section 523(a)(2)(A). If you narrow the scope of Section 523(a)(2)(B), all of the debts that would have been exempted from discharge by that section will now be exempted by Section 523(a)(2)(A). Conversely, however, if you narrow the scope of Section 523(a)(2)(A), only those debts that meet the heightened requirements of Section 523(a)(2)(B) (including that the false statements were written) will be exempt. The rest of the debts obtained by fraud—like Appling's here—are simply lost.

* * * * *

The fact that Appling's counsel has already urged this Court to *grant* review of the question presented may explain why Appling's response is focused on the merits. *See Bandi v. Becnel*, 133 S. Ct. 845 (2013). In *Bandi*, the petitioner argued that the circuit conflict on the question presented "has spawned widespread disagreement in bankruptcy courts across the Nation" and that the issue "is one of undisputed practical importance" that "recurs frequently and, as here, typically is dispositive of the dischargeability of affected debts." *Bandi* Pet. 9 (U.S. Oct. 8, 2012). None of that has changed. What has changed, though, is that the Eleventh Circuit decision in this case eliminates any doubt over whether the conflict will resolve itself and underscores the need for this Court's intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP, PETITIONER

v.

R. SCOTT APPLING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Bankruptcy Code bars an individual debtor from receiving a discharge of any debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's * * * financial condition." 11 U.S.C. 523(a)(2)(A). A debt that arises from a fraudulent statement "respecting the debtor's * * * financial condition" is nondischargeable only if the statement is in writing and additional requirements are met. 11 U.S.C. 523(a)(2)(B). The question presented is as follows:

Whether a debtor's statement concerning one of the debtor's assets, offered as evidence of the debtor's ability to pay a debt, is a "statement respecting the debtor's * * * financial condition" within the meaning of Section 523(a)(2).

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In the Supreme Court of the United States

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LAMAR, ARCHER & COFRIN, LLP, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. A central purpose of the federal bankruptcy system is to give insolvent debtors a "fresh start" by discharging their debts, while ensuring the maximum possible equitable distribution to creditors. See, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918). In furtherance of a general policy of "affording relief only to an 'honest but unfortunate debtor,'" however, Congress has enacted various provisions that prevent or limit the discharge in bankruptcy of debts that arise from a debtor's fraudulent acts. *Cohen* v. *de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan* v. *Garner*, 498 U.S. 279,

287 (1991)). Such provisions reflect Congress's evident determination that, in certain circumstances, "creditors' interest in recovering full payment of debts * * * outweigh[s] the debtors' interest in a complete fresh start." *Grogan*, 498 U.S. at 287.

Section 523(a) of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, declares various categories of debts ineligible for discharge. 11 U.S.C. 523(a).[1] As relevant here, Section 523(a)(2)(A) provides that a discharge under Chapters 7, 11, 12, or 13 of the Bankruptcy Code "does not discharge an individual debtor from any debt * * * for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition.*" 11 U.S.C. 523(a)(2)(A) (emphasis added). To establish nondischargeability under Section 523(a)(2)(A), a creditor must show "justifiable" reliance on the debtor's deceptive or fraudulent conduct. *Field* v. *Mans*, 516 U.S. 59, 61, 69-76 (1995).

An adjoining provision, Section 523(a)(2)(B), addresses the circumstances under which debts incurred through "a statement * * * respecting the debtor's or an insider's financial condition" are ineligible for discharge. 11 U.S.C. 523(a)(2)(B)(ii). Section 523(a)(2)(B) specifies that, for debts incurred through the use of such a statement, the debt is excepted from discharge only if the statement is "in writing"; is "materially false"; was

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[1] Although Section 523(a) applies by its terms only to "individual debtor[s]," Congress has extended its application to corporate debtors under Chapter 11 with respect to debts owed "to a domestic governmental unit" or "to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute." 11 U.S.C. 1141(d)(6); cf. 31 U.S.C. 3729-3733 (False Claims Act).

"reasonably relied" upon by "the creditor to whom the debtor is liable"; and was "caused to be made or published" by the debtor "with intent to deceive." 11 U.S.C. 523(a)(2)(B)(i)-(iv). Section 523(a)(2)(B)'s requirements thus differ from those of Section 523(a)(2)(A) in several respects, including by requiring that the statement be in writing and that the creditor show reasonable (not merely justifiable) reliance.

The dispute in this case concerns the meaning of the phrase "statement respecting the debtor's * * * financial condition." The answer to the interpretive question presented here controls whether the dischargeability of respondent's debt is determined under Section 523(a)(2)(A) or Section 523(a)(2)(B).[2]

2. a. In July 2004, respondent R. Scott Appling hired petitioner Lamar, Archer & Cofrin, LLP, a law firm, to represent him in litigation against the former owners of a business he had recently purchased. Pet. App. 46a-47a. Respondent soon fell behind on his legal bills, however, and by March 2005 owed petitioner more than $60,000. *Ibid.* Petitioner advised respondent by letter that unless the overdue fees were promptly paid, it would terminate its representation and would place an attorney's lien on its work product. *Id.* at 47a-48a.

On March 18, 2005, respondent met with Robert Lamar, a partner of the petitioner law firm, at the office of petitioner's local counsel. Pet. App. 47a-48a. According to petitioner, respondent stated at the meeting that his

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[2] The parties apparently do not dispute (cf. Pet. 12 n.2), and the United States agrees, that the phrase "statement respecting the debtor's or an insider's financial condition," 11 U.S.C. 523(a)(2)(A) and (B), bears a consistent meaning regardless of whether the debtor's or an insider's financial condition is at issue. See 11 U.S.C. 101(31) (defining "insider").

accountant had prepared him an amended tax return through which he would "receive a tax refund of approximately $100,000," which would be enough to pay petitioner's current and future fees. *Id.* at 48a. Petitioner asserts that, in reliance on that statement, it continued to represent respondent in the underlying litigation and did not begin collecting the outstanding fees. *Ibid.*

Roughly three months later, respondent and his wife filed their amended tax return. Pet. App. 48a. Rather than seeking a refund of approximately $100,000, the return sought only $60,718, which the IRS further adjusted to $59,851. *Ibid.* Upon receiving a refund in that lower amount, respondent did not use it to pay the outstanding fees. *Id.* at 48a-49a.

In November 2005, respondent again met with his attorneys to discuss the outstanding fees and the future of their professional relationship. Pet. App. 49a. According to petitioner, respondent stated at this meeting that he had not yet received the tax refund, and also failed to disclose that the refund he had requested (and, by then, had received) was significantly less than the $100,000 he had originally indicated. *Id.* at 49a, 58a-60a. Petitioner contends that in reliance on these statements, it continued to represent respondent through a contemplated settlement of the underlying litigation and continued to forbear from collecting the outstanding fees. *Id.* at 49a.

In June 2006, a few months after the underlying litigation settled, petitioner learned that respondent had received the tax refund and had spent it on his business rather than using it to pay petitioner's fees. Pet. App. 49a. Petitioner later sued respondent in state court for its overdue fees plus interest, and in October 2012, it obtained a judgment against respondent for $104,179.60.

Ibid. Three months later, respondent and his wife filed for bankruptcy under Chapter 7. *Ibid.*

b. Petitioner initiated an adversary proceeding in the bankruptcy court, seeking a determination that the debt created by petitioner's state-court judgment against respondent was nondischargeable under 11 U.S.C. 523(a)(2)(A). In its amended complaint, petitioner alleged that respondent's false statements about his tax return had induced petitioner to continue its representation and to forbear from collecting the existing debt, and that respondent had thereby committed "false pretenses, a false representation, or actual fraud." C.A. App. A42 (quoting 11 U.S.C. 523(a)(2)(A)); see *id.* at A33-A43. Respondent moved to dismiss, arguing that the alleged false statements were statements respecting his financial condition and that petitioner's claim failed because the statements were not "in writing," as Section 523(a)(2)(B) requires. See Pet. App. 70a.

The bankruptcy court denied respondent's motion. Pet. App. 67a-81a. The court observed that distinct "views have emerged on the proper interpretation of the phrase 'respecting the debtor's . . . financial condition.'" *Id.* at 71a (quoting *In re May*, No. 06-8044, 2007 WL 2052185, at *6 (6th Cir. B.A.P. July 19, 2007)). The court identified a "'broad interpretation,'" under which the phrase encompasses "any communication that has a bearing on the debtor's financial position." *Ibid.* (citation omitted). But the court instead "adopt[ed] the 'strict interpretation,'" under which the phrase encompasses only "communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities." *Id.* at 71a-72a (citations omitted). The court concluded that, because respondent's "alleged oral misrepresentation regarding

* * * the tax refund" had involved a "single asset" and had not stated his "overall financial condition or net worth," it was "not a representation 'respecting the debtor's . . . financial condition.'" *Id.* at 73a, 76a.

Following a two-day trial, the bankruptcy court held that petitioner's claim was nondischargeable under Section 523(a)(2)(A). The court found that respondent had "knowingly misrepresented the amount of the tax refund" at the March 2005 meeting, Pet. App. 55a; that respondent had made a "knowingly false representation at the November 2005 meeting that he had not yet received the refund," *id.* at 58a; and that respondent had "committed a false pretense" by "not disclosing the true amount of the refund," *id.* at 59a. The court further found that petitioner had justifiably relied on those representations in forgoing immediate collection of the outstanding fees, *id.* at 60a-62a, and that this forbearance amounted to an "extension of credit" that "made the entire debt nondischargeable," *id.* at 65a-66a; see *id.* at 62a-66a, 79a-81a.

c. The district court affirmed. Pet. App. 20a-44a. It observed that "[c]ourts disagree whether to construe the phrase 'respecting the debtor's . . . financial condition' broadly or strictly." *Id.* at 25a. Like the bankruptcy court, the district court adopted "the strict interpretation" of that phrase and held that, because "[respondent's] statements about his tax refund involved a single asset," they did not constitute statements respecting his financial condition. *Id.* at 26a, 30a.

d. The court of appeals reversed. Pet. App. 1a-19a. Citing decisions from the Fourth, Fifth, Eighth, and Tenth Circuits and from numerous district and bankruptcy courts, the court of appeals recognized that the question whether "a statement about a single asset can

be a 'statement respecting the debtor's ... financial condition'" has "divided the federal courts." *Id.* at 1a, 6a-7a (citation omitted). The court agreed that the term "'[f]inancial condition' likely means one's overall financial status." *Id.* at 7a. The court explained, however, that "even if 'financial condition' means the sum of all assets and liabilities, it does not follow that the phrase 'statement *respecting* the debtor's ... financial condition,' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (quoting 11 U.S.C. 523(a)(2)).

Based on dictionary definitions of the term "respecting," the court of appeals reasoned that "[a] statement about a single asset" "can 'respect' a debtor's 'financial condition'" inasmuch as it "'relates to' or 'impacts' a debtor's overall financial condition," and serves as "a partial step toward knowing whether the debtor is solvent or insolvent." Pet. App. 8a-9a. The court concluded that Section 523(a)(2) is "not ambiguous" and "establish[es] that a statement about a single asset can be a 'statement respecting the debtor's ... financial condition.'" *Id.* at 7a, 12a (citation omitted). Because respondent's statements about the tax refund were statements respecting his financial condition, and because those statements were not in writing, the court concluded that neither Section 523(a)(2)(A) nor (B) barred discharge of respondent's debt.

Judge Rosenbaum concurred. Although she disagreed with the majority's view that the statutory text is unambiguous, Pet. App. 15a, she concluded that the majority's interpretation of the statute was more consistent with congressional intent, *id.* at 19a.

DISCUSSION

The Eleventh Circuit correctly held that a statement about a debtor's asset, offered as evidence of the debtor's ability to pay, can be a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2). This Court's review is nonetheless warranted because the decision below deepens an existing circuit conflict about the meaning of that phrase. The question presented is important and recurring, and this case is a suitable vehicle to resolve the disagreement among the circuits. The petition for a writ of certiorari therefore should be granted.

A. This Case Warrants The Court's Review Because It Presents An Important, Recurring Question On Which The Courts Of Appeals Are Divided

The question in this case is whether a statement about one aspect of a debtor's financial circumstances, such as a single asset of the debtor, qualifies as a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2)(A) and (B). The resolution of that question controls whether a creditor who objects to discharge of a debt that arose out of a fraudulent statement about the debtor's asset may proceed under Section 523(a)(2)(A) or instead must proceed under Section 523(a)(2)(B). In particular, resolution of that question controls whether a debtor's fraudulent *oral* statement about a particular asset can render a debt nondischargeable. The question presented arises with some frequency and has been the subject of substantial disagreement among the lower federal courts.

1. "The circuits and other federal courts are split on th[e] question" presented. Pet. App. 6a; see *id.* at 25a, 71a. Like the Eleventh Circuit, the Fourth Circuit has held that a statement concerning a specific asset may

qualify as a "statement respecting the debtor's * * * financial condition," while the Fifth and Tenth Circuits have taken the contrary view.

The Fourth Circuit's decision arose from a loan in which the debtor's livestock and farm implements served as collateral, which the debtor falsely stated were not subject to any superior security interests. See *Engler* v. *Van Steinburg*, 744 F.2d 1060 (1984). In arguing that the debt was nondischargeable under Section 523(a)(2)(A), the creditor asserted that "a statement respecting the debtor's financial condition means a formal financial statement, such as a typical balance sheet or a profit and loss statement." *Id.* at 1060. The court of appeals disagreed, explaining that "Congress did not speak in terms of financial statements," but instead "referred to a much broader class of statements—those 'respecting the debtor's . . . financial condition.'" *Id.* at 1060-1061. The court concluded that "[a] debtor's assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition," so that such a "statement must be in writing to bar the debtor's discharge." *Id.* at 1061.

The Fifth and Tenth Circuits have adopted a contrary interpretation. The Tenth Circuit in *In re Joelson*, 427 F.3d 700 (2005), cert. denied, 547 U.S. 1163 (2006), considered a dispute arising from a debtor's false representations that she owned several residences, a motel, and "a number of antique vehicles" that could serve as "collateral to secure the [creditor's] loan." *Id.* at 703. The court of appeals observed that "[t]he phrase 'respecting the debtor's . . . financial condition' has a range of potential meanings." *Id.* at 705. After surveying the "text and structure of the Bankruptcy Code, the legislative history of § 523(a)(2)(A) and

(B), and case law," *id.* at 714; see *id.* at 706-714, the court adopted the "strict reading" and held that the phrase covers only statements "that purport to present a picture of the debtor's overall financial health." *Id.* at 714. The court accordingly concluded that the false representations concerning the alleged collateral, although made to induce the creditor to believe that the debtor could repay the loan, were not statements respecting her financial condition. *Id.* at 714-715.

The Fifth Circuit in *In re Bandi*, 683 F.3d 671 (2012), cert. denied, 568 U.S. 1086 (2013), considered similar misrepresentations and reached the same result. The creditor opposed discharge of a promissory note executed by the debtors' business, where the debtors had falsely represented that they owned certain commercial real estate. The court held that the phrase "statement respecting the debtor's * * * financial condition" covers only "statements * * * 'that purport to present a picture of the debtor's overall financial health.'" *Id.* at 676, 677 (quoting *Joelson*, 427 F.3d at 714).[3]

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[3] The Eighth Circuit's decision in *In re Lauer*, 371 F.3d 406 (8th Cir. 2004), is sometimes cited as reflecting an approach consistent with that of the Fifth and Tenth Circuits. See, *e.g.*, Pet. App. 6a-7a, 27a, 72a. In *Lauer*, the debtor was a general partner who, in purchasing the interests of limited partners in return for deferred payments, falsely represented that the partnership retained an interest in an asset (a nursing home) that would serve as security for the deferred payments. The debtor argued that his "failure to disclose" that the asset had been sold was a "'statement respecting * * * an insider's financial condition,'" and asserted that the debt resulting from missed deferred payments was dischargeable because the creditors could not satisfy Section 523(a)(2)(B). 371 F.3d at 413 (citation omitted). The court of appeals cited a passage from *Field* v. *Mans*, 516 U.S. 59 (1995), in which this Court suggested that Section 523(a)(2)(B) may have been intended to redress abuse

The decision below cannot be reconciled with the reasoning of the Fifth and Tenth Circuits. The disagreement among the lower federal courts has been noted by other courts of appeals, see *In re Curran*, 855 F.3d 19, 23 (1st Cir. 2017); *Stelmokas* v. *Kodzius*, 460 Fed. Appx. 600, 603 (7th Cir. 2012); *In re Bogdanovich*, 292 F.3d 104, 112-113 (2d Cir. 2002), and by a leading bankruptcy treatise, see 4 *Collier on Bankruptcy* ¶ 523.08[2][c] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2017). As respondent acknowledges (Br. in Opp. 12), moreover, the question presented arises regularly in federal bankruptcy and district courts, as the non-exhaustive lists of cases compiled by the court of appeals (Pet. App. 6a-7a) and petitioner (Pet. 17-18 & nn.4-5) demonstrate. The conflict thus is of the kind that ordinarily warrants this Court's review.

2. Respondent's assertions that "[r]eview is premature" (Br. in Opp. 9-12) are not persuasive. Respondent principally contends (*id.* at 11) that no other circuit has "wrestled with the plain meaning of 'respecting,'" and he suggests that this Court should await a decision in which "a sister court of appeals expressly considers and rejects the Eleventh Circuit's reasoning." But the Fifth

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by "consumer finance companies, which sometimes have encouraged [false financial statements] by their borrowers for the very purpose of insulating their own claims from discharge." *Lauer*, 371 F.3d at 413 (brackets in original) (quoting *Field*, 516 U.S. at 76-77). Noting that the transaction at issue "was a sale, not a loan," and that it did not involve "a creditor that routinely require[s] the submission of financial statements," the court concluded that it was more appropriate to apply Section 523(a)(2)(A) than Section 523(a)(2)(B). *Id.* at 413-414. But the court did not expressly interpret the phrase "statement respecting the debtor's or an insider's financial condition."

and Tenth Circuits, in reasoned decisions focused exclusively on the question presented in this case, have already interpreted the same statutory text and reached a conclusion opposite to that of the Eleventh Circuit. If this case had arisen in either of those circuits, governing precedent would hold that respondent's representations were not "statement[s] respecting [his] * * * financial condition," and petitioner's objection to discharge would be analyzed under Section 523(a)(2)(A) rather than under Section 523(a)(2)(B). That the Fifth and Tenth Circuits did not place significant weight on the word "respecting" reflects only that those courts deemed other considerations more persuasive in interpreting the statutory text.

Respondent's suggestion (Br. in Opp. 12) that this Court should await the outcome in *In re Haler*, No. 17-40229 (5th Cir. oral argument scheduled for Dec. 5, 2017), is similarly unconvincing. As noted, the Fifth Circuit has already resolved the question presented in petitioner's favor, and respondent does not seriously dispute that the court in *Haler* will be bound by its prior decision in *Bandi*. The debtor's principal argument in *Haler* is that the statements at issue qualify as "statements respecting * * * financial condition" even under *Bandi*. See Appellant Br. at 13-18, *Haler*, *supra* (No. 17-40229). And even if the Fifth Circuit in *Haler* overruled its prior decision in *Bandi*, the circuit split would persist because of the Tenth Circuit's decision in *Joelson*.

Respondent observes (Br. in Opp. 11) that this Court has previously denied review of the question presented. But when the Court last considered whether to grant review (in *Bandi*), only the Fourth Circuit had concluded that a statement concerning a single asset may

qualify as a statement respecting financial condition, and its decision predated those of the other courts of appeals. The Eleventh Circuit's decision in this case has "eliminated any element of staleness" and "any realistic chance that the conflict would sort itself out on its own." Pet. 15.

Finally, respondent's contention that this case is "a poor vehicle for review" (Br. in Opp. 27) is also unpersuasive. Respondent suggests that "resolution of the question presented is unlikely to have any bearing on [the] ultimate outcome" of the case, *ibid.*, because petitioner's objection to discharge would ultimately fail even under Section 523(a)(2)(A) due to lack of proof of common-law damages. But this argument, which the bankruptcy and district courts considered and rejected, see Pet. App. 41a-44a, 62a-66a, 79a-81a, would not preclude the Court from reaching and resolving the question presented.[4] To the contrary, respondent's damages argument will become relevant only if this Court grants review and holds that respondent's statements were not ones "respecting [his] * * * financial condition." 11 U.S.C. 523(a)(2)(A). The question presented in this Court was the sole issue passed upon by the court of appeals below, and the government is aware of no obstacle that would prevent this Court from similarly reaching and resolving the question on this record.

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[4] The United States takes no position here on the merits of those rulings.

B. A Statement Concerning A Particular Asset Can Be A Statement "Respecting" The Debtor's Financial Condition Under Section 523(a)(2)

The court of appeals correctly held that a statement concerning a particular asset may qualify as a "statement respecting the debtor's * * * financial condition." 11 U.S.C. 523(a)(2)(A). In the view of the United States, an affirmative representation by a debtor qualifies as a statement respecting financial condition when it relates to a debtor's financial circumstances and is offered by the debtor as evidence of his ability to pay.

1. This Court's "interpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom* v. *FIA Card Servs.*, 562 U.S. 61, 69 (2011) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). A "cardinal principle" is that a "statute ought * * * to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).

In interpreting the statutory phrase "statement respecting the debtor's * * * financial condition," the court of appeals properly gave meaning to each of the phrase's components. The court recognized that the term "[f]inancial condition," taken alone, refers to a person's "overall financial status." Pet. App. 7a. The court further observed, however, that the statute refers to "statement[s] *respecting* the debtor's . . . financial condition," *id.* at 8a (quoting 11 U.S.C. 523(a)(2)(A)) (emphasis added by court of appeals), and reasoned that courts "must not read the word 'respecting' out of the statute," *ibid.* The court noted that the term "[r]espect-

ing" has been "defined broadly" as "[w]ith regard or relation to; regarding; concerning," *ibid.* (brackets in original) (quoting *Webster's New International Dictionary of the English Language* 2123 (2d ed. 1959)), and as "[w]ith respect to; with reference to; as regards," *ibid.* (quoting *Oxford English Dictionary* (online ed.)). Just as a representation "can 'relate to' or 'concern' someone's health without describing [the person's] entire medical history," so too a statement "can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.*

The court of appeals also properly concluded that the word "statement" should be given an "ordinary," rather than "technical," meaning. Pet. App. 9a-10a. If Congress had intended to cover only "formal financial statement[s]," it could have so specified, rather than using the non-technical phrase "statement respecting the debtor's * * * financial condition." *Id.* at 10a. Indeed, Congress's proviso that the "statement" must be "in writing" in order to establish nondischargeability under Section 523(a)(2)(B) is consistent with the understanding that "statement" was intended to refer to "an expression or embodiment in words," as opposed to a comprehensive financial accounting that would generally exist in writing in any event. *Id.* at 10a-11a.

2. The statutory lineage of the phrase "statement respecting the debtor's * * * financial condition" also supports the court of appeals' interpretation. With regard to discharges in bankruptcy, the phrase dates to 1926, when Congress amended existing law to provide that a debtor would be denied any discharge entirely if the debtor had "obtained money or property on credit, or obtained an extension or renewal of credit, by making

or publishing * * * in any manner whatsoever, a materially false statement in writing respecting his financial condition." Act of May 27, 1926, ch. 406, § 6, 44 Stat. 663 (amending Section 14(b) of the Bankruptcy Act, ch. 541, § 14(b), 30 Stat. 550 (1898)). Congress later amended the law to provide that such a statement, when made by a nonbusiness debtor, would bar discharge only of the particular debt that arose from the statement, rather than preclude the debtor's discharge entirely. See Act of July 12, 1960, Pub. L. No. 86-621, § 2(a), 74 Stat. 409. Throughout this period, courts understood the statutory phrase "materially false statement in writing respecting his financial condition" to include statements that described a debtor's specific asset or assets. 11 U.S.C. 32(c)(3) (1976); see, *e.g.*, *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356, 1357-1358 (9th Cir.) (per curiam) (holding that "appellants' recordation of [a false] deed * * * for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition"), cert. denied, 434 U.S. 832 (1977); *Shainman* v. *Shear's of Afflon, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967) ("A written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation."); *Scott* v. *Smith*, 232 F.2d 188, 190 (9th Cir. 1956) ("The bankrupt's implied representation * * * that he then had some ownership or control of property * * * available for hypothecation by him, amounts to a statement 'respecting his financial condition.'"); *Albinak* v. *Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945) ("No cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as

limited to a detailed statement of assets and liabilities.").

When Congress enacted the Bankruptcy Code in 1978, the House Report noted that the Code "continues the exception to discharge based on a false statement in writing concerning the debtor's financial condition." H.R. Rep. No. 595, 95th Cong., 1st Sess. 129 (1977) (*House Report*). Congress undertook "some modifications" to that exception, including extending the provision to cover "debt[s] for services" in addition to debts for money, property, and credit; requiring "reasonable reliance" in lieu of lesser reliance; and requiring an unsuccessful creditor to pay "costs, attorney's fees, and damages to a consumer debtor." *Id.* at 129, 130. Congress also clarified that debts obtained by fraudulent "statement[s] respecting * * * financial condition" would be excluded from the general provision barring the discharge of debts obtained by fraud, cf. 11 U.S.C. 523(a)(2)(A), and instead would be governed by an independent provision, cf. 11 U.S.C. 523(a)(2)(B). But Congress retained substantively the same phrase—"statement respecting * * * financial condition"—that courts had interpreted under prior bankruptcy law. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

3. As the court of appeals noted, its interpretation also can be understood to serve Congress's policy goals. The broader interpretation "gives creditors an incentive to create writings before the fact," which may "reduce the incidence of fraud" in the first instance. Pet. App. 13a-14a. By creating "reliable evidence" for future

litigation, such a writing "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." *Id.* at 13a. And while lower courts have disagreed as to the best interpretation of the phrase "statement respecting the debtor's * * * financial condition," Congress clearly intended that such statements should be treated differently from other false representations used to obtain money, property, services, or credit. See *ibid.* (noting that the Bankruptcy Code "imposes different requirements of proof for different kinds of statements"); cf. *Field* v. *Mans*, 516 U.S. 59, 76 (1995) (suggesting that Congress may have viewed "the relative equities" differently in the context of "lies about financial condition"); *House Report* 130 (identifying abuses in the consumer-finance industry).

4. By contrast, the interpretation favored by petitioner entails substantial line-drawing problems and may cause unjustified differential treatment of functionally equivalent scenarios.

First, petitioner offers no clear test for identifying those representations that are sufficiently comprehensive to constitute a "statement respecting * * * financial condition." It is unclear, for example, whether petitioner would view a statement that comprehensively describes one side of a debtor's balance sheet—*e.g.*, all of a debtor's assets, but none of his liabilities—as a statement respecting his financial condition. The Tenth Circuit's lengthy, and apparently non-exhaustive, list of representations qualifying as "statement[s] respecting * * * financial condition" is indicative of the significant line-drawing problems under petitioner's approach. See *Joelson*, 427 F.3d at 714 (suggesting that statements respecting financial condition include "those

analogous to balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that present the debtor or insider's net worth, overall financial health, or equation of assets and liabilities," but cautioning that "such statements need not carry [any] formality"). And however clear the distinction between statements of a debtor's "overall financial position" (*ibid.*) and statements about a particular asset or assets might be in the context of a business, it is considerably less clear in the context of individuals, whose financial holdings are generally less extensive. Cf. 11 U.S.C. 523(a) (governing exceptions to discharge for "individual debtor[s]"). But cf. p. 2 n.1, *supra* (noting that Section 523 also applies to corporate Chapter 11 debtors for specified governmental debts).

Second, to the extent that petitioner's approach perceives representations of "overall financial condition" to be distinct because they illuminate a debtor's "ability to repay debt," *Bandi*, 683 F.3d at 676, its interpretation is significantly underinclusive. Many consumer lenders have not required comprehensive financial information before deciding whether to lend. See 81 Fed. Reg. 47,864, 47,872 (July 22, 2016) (noting that "payday" lenders typically require information only about an individual's income and personal deposit accounts, and not about a borrower's other financial obligations). And many creditors rely principally upon the value of a particular asset of the debtor—for instance, property pledged or offered by the debtor as collateral, see *Joelson*, 427 F.3d at 703—in deciding whether a debtor's financial circumstances justify the transaction. The notional difference between comprehensive financial information, and other financial information, is not

necessarily a meaningful one in motivating the real-world behavior of either debtors or creditors.

Section 523(a)(2)(A)'s rule of nondischargeability, moreover, is limited to debts "for money, property, services, or * * * credit, *to the extent obtained by*" a false statement or similar deceptive conduct. 11 U.S.C. 523(a)(2) (emphasis added). Because "some degree of reliance is required to satisfy the element of causation inherent in the phrase 'obtained by'" in Section 523(a)(2), *Field*, 516 U.S. at 66; see Pet. App. 60a-61a, the determination whether a particular statement was one "respecting the debtor's * * * financial condition" will make a practical difference only if the creditor relied on that statement in deciding to provide money, etc. Thus, while many statements by debtors about specific assets may well be irrelevant to creditors' financial decisions, Section 523(a)(2)(A) is concerned only with statements that actually affect creditor behavior. Here, for example, a partner in the petitioner firm "testified that [petitioner] agreed to continue its representation of [respondent] and forego collection activities in reliance upon [respondent's] representations regarding the tax refund." Pet. App. 61a. Where a debtor's statement about a particular asset is offered as evidence of his ability to pay, and the statement actually induces a creditor to provide money, property, services, or credit, there is no evident reason to treat that statement differently than when a statement about the debtor's overall finances has the same effect.

Third, petitioner's interpretation appears to yield different results depending on whether a creditor receives the debtor's financial information all at once or instead through multiple disclosures. Under petitioner's approach, if a creditor asks the debtor for a

comprehensive statement of his financial condition, and the debtor misrepresents his salary within that statement, the creditor would need to satisfy the requirements of Section 523(a)(2)(B) in order to show that the debt was nondischargeable in bankruptcy. But if the creditor had previously obtained a comprehensive statement of the debtor's financial condition, and then requested an update only as to the debtor's salary, petitioner would not view that update as a statement respecting the debtor's financial condition.

The facts of this case may illustrate that concern. At trial, Robert Lamar (a partner in the petitioner firm) acknowledged that petitioner was generally aware of the financial condition of respondent and his company by virtue of its work in the underlying litigation, for which petitioner had procured an expert valuation of respondent's business and had obtained a restraining order against the payment of certain debts in order to prevent respondent from becoming insolvent. See C.A. App. A35; D. Ct. Doc. 6 (May 4, 2015); D. Ct. Doc. 7 (May 4, 2015); Bankr. Ct. Doc. 66, at 65, 80, 83-86 (Dec. 22, 2014). Petitioner may have refrained from requesting any statement of respondent's "overall net worth" at the March 2005 meeting, instead relying solely upon his statement about the tax refund, only because petitioner was already familiar with respondent's difficult overall financial circumstances. Cf. Pet. App. 62a (concluding that petitioner had justifiably relied on respondent's representations because petitioner "clearly believed that the tax refund was the only source of cash [respondent] would have to pay the fees").

5. The United States is the largest creditor in the Nation and frequently appears as a creditor in bankruptcy cases, including by objecting to the discharge of

debts for money or property obtained through fraud. Because the United States typically relies on written representations when providing money, property, services, or credit to individual debtors, the government's ability to prevent discharge usually will not depend on whether Section 523(a)(2)(A) or Section 523(a)(2)(B) covers a particular representation. The government as creditor nonetheless might benefit in some circumstances from an approach under which a debtor's fraudulent oral statement concerning a specific asset or liability could prevent discharge of his debt. In the view of the United States, however, the better reading of the statutory text is that a statement concerning a single asset, when tendered as evidence of the debtor's ability to pay, is a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2). Thus, while the United States agrees with petitioner that the petition for a writ of certiorari should be granted, the government believes that the judgment below ultimately should be affirmed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2017

No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,
v.
R. SCOTT APPLING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 11, 2017
CERTIORARI GRANTED JANUARY 12, 2018

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United States Bankruptcy Court for the Middle District of Georgia Relevant Docket Entries: *In re Appling*, No. 13-30083 ..... JA-7

United States Bankruptcy Court for the Middle District of Georgia Relevant Docket Entries: *Lamar, Archer & Cofrin, LLP v. Appling*, Adversary No. 13-3042 ..... JA-13

Transcript of September 18, 2014 Trial Proceedings, *Lamar, Archer & Cofrin, LLP v. Appling*, No. 13-03042 (Bankr. M.D. Ga. Dec. 30, 2014), ECF No. 66 (excerpts) JA-31

Transcript of September 23, 2014 Trial Proceedings, *Lamar, Archer & Cofrin, LLP v. Appling*, No. 13-03042 (Bankr. M.D. Ga. Dec. 30, 2014), ECF No. 69 (excerpts) JA-111

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (April 11, 2017)

Opinion of the United States Court of Appeals for the Eleventh Circuit, *Appling v. Lamar, Archer & Cofrin, LLP (In re Appling)*, 848 F.3d 953 (11th Cir. 2017) 1a

Order on Appeal of the United States District Court for the Middle District of Georgia, *R. Scott Appling v. Lamar, Archer & Cofrin, LLP*, No. 3:15-CV-031 (M.D. Ga. Mar. 28, 2016).....20a

Opinion of the United States Bankruptcy Court for the Middle District of Georgia, *Lamar, Archer & Cofrin, LLP v. Appling (In re Appling)*, 527 B.R. 545 (Bankr. M.D. Ga. Mar. 10, 2015) 45a

Opinion of the United States Bankruptcy Court for the Middle District of Georgia, *Lamar, Archer & Cofrin, LLP v. Appling (In re Appling)*, 500 B.R. 246 (Bankr. M.D. Ga. 2013) 67a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Eleventh Circuit
Case No. 16-11911

Date Filed	Docket Text
04/28/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant R. Scott Appling on 04/22/2016. Fee Status: Fee Paid. No hearings to be transcribed. The appellants brief is due on or before 06/01/2016. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's CIP Due on or before 05/12/2016 as to Appellant R. Scott Appling
	* * *
06/15/2016	Appellant's brief filed by R. Scott Appling. (ECF: Paul Hughes)
	* * *
06/21/2016	Appendix filed [One VOLUMES] by Appellant R. Scott Appling. (ECF: Paul Hughes)
	* * *
08/02/2016	Corrected Appellee's Brief filed by Appellee Lamar, Archer & Cofrin, LLP. (ECF: David Davenport)
	* * *

09/01/2016	Reply Brief filed by Appellant R. Scott Appling. (ECF: Paul Hughes)
	* * *
12/15/2016	Oral argument held. Oral Argument participants were Paul Whitfield Hughes for Appellant R. Scott Appling and Robert C. Lamar for Appellee Lamar, Archer & Cofrin, LLP.
02/15/2017	Opinion issued by court as to Appellant R. Scott Appling. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.
02/15/2017	Judgment entered as to Appellant R. Scott Appling
03/16/2017	Mandate issued as to Appellant R. Scott Appling
04/11/2017	Notice of Writ of Certiorari filed as to Appellant R. Scott Appling. SC# 16-1215.
	* * *
01/16/2018	Writ of Certiorari filed as to Appellee Lamar, Archer & Cofrin, LLP is GRANTED. SC# 16-1215.--[Edited 01/18/2018 by JC]

RELEVANT DOCKET ENTRIES

U.S. District Court
for the Middle District of Georgia
Case No. 3:15-cv-00031-CAR

Date Filed	#	Docket Text
03/24/2015	1	Notice of APPEAL FROM BANKRUPTCY COURT filed by R. SCOTT APPLING (US BANKRUPTCY COURT,) (Main Document 1 replaced on 3/24/2015) (ggs). (Additional attachment(s) added on 3/24/2015: # 1 Docket Sheet, # 2 Orders being appealed) (ggs). (Entered: 03/24/2015)
		* * *
04/22/2015	3	Notice of BANKRUPTCY APPEAL RECORD filed Bankruptcy APPEAL RECORD including docket sheet and trial exhibits attached. **The Notice of Electronic Filing serves as certification for these appeal documents.** (US BANKRUPTCY COURT,) (Entered: 04/22/2015)
		* * *

04/23/2015	5	EXHIBIT(S) Additional Exhbits to the Appeal Record: Part 1 of Exhibits from the September 18 trial re 3 Bankruptcy Appeal (Attachments: # 1 Part 2 of Exhbits from the September 18 trial, # 2 Exhibits from the September 23 trial) (ggs) (Entered: 04/23/2015)
05/04/2015	6	Supplemental Record on Appeal transmitted re 1 Bankruptcy Appeal (US BANKRUPTCY COURT,) (Entered: 05/04/2015)
05/04/2015	7	Supplemental Record on Appeal transmitted re 1 Bankruptcy Appeal (US BANKRUPTCY COURT,) (Entered: 05/04/2015)
		* * *
05/27/2015	9	Appellant's BRIEF by R. SCOTT APPLING. (WILDER, DANIEL) (Entered: 05/27/2015)
		* * *
07/02/2015	11	Appellee's BRIEF by LAMAR, ARCHER & COFRIN, LLP. (DAVENPORT, DAVID) (Entered: 07/02/2015)
07/20/2015	12	Appellant's REPLY BRIEF by R. SCOTT APPLING (WILDER, DANIEL) (Entered: 07/20/2015)

03/28/2016	13	**ORDER** that the decision of the Bankruptcy Court be AFFIRMED. Ordered by US DISTRICT JUDGE C ASHLEY ROYAL on 3/28/16. (lap) (Entered: 03/28/2016)
03/29/2016	14	**JUDGMENT** affirming Bankruptcy Court's decision. (ggs) (Entered: 03/29/2016)
04/22/2016	15	NOTICE OF APPEAL as to 14 Judgment, 13 Order by R. SCOTT APPLING. Filing fee $ 505, Receipt No.: 113G-2310364. (WILDER, DANIEL) (Entered: 04/22/2016)
		* * *
04/25/2016	16	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: 14 Judgment, 13 Order, 15 Notice of Appeal Judge Appealed: C. Ashley Royal. Court Reporter: N/A. Fee Paid: PAID. (ggs) (Entered: 04/25/2016)
04/25/2016		Pursuant to F.R.A.P 11(c) the Clerk of the District Court for the Middle District of Georgia certifies that the record is complete for purposes of this appeal re: 15 Notice of Appeal. The entire record on appeal is available electronically (ggs) (Entered: 04/25/2016)

04/28/2016	17	USCA Case Number 16-11911-GG re 15 Notice of Appeal filed by R. SCOTT APPLING. (ggs) (Entered: 04/28/2016)
02/15/2017	18	USCA Order/Opinion Reversing and Remanding as to 15 Notice of Appeal filed by R. SCOTT APPLING (Attachments: # 1 Cover Letter)(ggs) (Entered: 02/15/2017)
03/06/2017	19	**ORDER** on Bankruptcy Appeal re 18 USCA Order. Ordered by US DISTRICT JUDGE C ASHLEY ROYAL on 3/6/17. (lap) (Entered: 03/06/2017)
03/16/2017	20	MANDATE of USCA reversing and remanding as to 15 Notice of Appeal filed by R. SCOTT APPLING (Attachments: # 1 Cover Letter)(ggs) (Entered: 03/16/2017)
03/16/2017	21	**JUDGMENT** remanding case (ggs) (Entered: 03/16/2017)

RELEVANT DOCKET ENTRIES

U.S. Bankruptcy Court
for the Middle District of Georgia
Case No. 13-30083

Date Filed	#	Docket Text
01/18/2013	1	Chapter 7 Voluntary Petition All schedules and statements have been filed. Fee Amount $306 filed by R. Scott Appling, Connie F. Appling (Entered: 01/18/2013)
01/18/2013		Receipt of Voluntary Petition (Chapter 7)(13-30083) [misc,volp7] (306.00) Filing Fee. Receipt number 9038998. Fee amount 306.00. (U.S. Treasury) (Entered: 01/18/2013)
01/18/2013	2	Social Security Number (B21) filed by Connie F. Appling, R. Scott Appling (Wilder, Daniel) (Entered: 01/18/2013)
		* * *
01/18/2013	5	Employee Income Records or Affidavit of No Income filed by Connie F. Appling, R. Scott Appling (Wilder, Daniel) (Entered: 01/18/2013)
		* * *

01/23/2013	8	Amended Petition; reason for amendment:to include the image of the matrix; filed by Connie F. Appling, R. Scott Appling (related document(s)1 Voluntary Petition (Chapter 7)) (Wilder, Daniel) (Entered: 01/23/2013)
		* * *
01/30/2013	11	Notice of Appointment of Successor Trustee. William Flatau added to the case. Ernest V. Harris removed from the case. filed by U.S. Trustee – MAC (Hardy, Elizabeth) (Entered: 01/30/2013)
		* * *
02/07/2013	15	Motion to Avoid Lien with Branch Banking & Trust Co. filed by Connie F. Appling, R. Scott Appling Objections due by 2/27/2013.Hearing scheduled for 03/27/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 02/07/2013)
02/07/2013	16	Motion to Avoid Lien with John Davis filed by Connie F. Appling, R. Scott Appling Objections due by 2/27/2013.Hearing scheduled for 03/27/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 02/07/2013)

02/07/2013	17	Motion to Avoid Lien with Lamar, Archer & Cofrin, LLP filed by Connie F. Appling, R. Scott Appling Objections due by 2/27/2013.Hearing scheduled for 03/27/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 02/07/2013)
03/01/2013	18	Order Granting Motion To Avoid Lien with Lamar, Archer & Cofrin, LLP (Related Doc # 17) Signed on 3/1/2013. (Huellemeier, M.) (Entered: 03/04/2013)
03/01/2013	19	Order Granting Motion To Avoid Lien with John Davis (Related Doc # 16) Signed on 3/1/2013. (Huellemeier, M.) (Entered: 03/04/2013)
		* * *
03/11/2013	24	Motion to Avoid Lien with Branch Banking & Trust *Amended* filed by Connie F. Appling, R. Scott Appling Objections due by 4/1/2013.Hearing scheduled for 04/24/2013 at 02:00 PM - Athens Courthouse. (Wilder, Daniel) (Entered: 03/11/2013)

03/12/2013	25	Notice of Withdrawal filed by Connie F. Appling, R. Scott Appling (related document(s)15 Motion to Avoid Lien) (Wilder, Daniel) Modified on 3/18/2013 (Martin, D.). Amended by document 26. (Entered: 03/12/2013)
03/15/2013	26	Amended Document Corrent caption to include creditor name filed by Connie F. Appling, R. Scott Appling (related document(s)15 Motion to Avoid Lien, 25 Notice of Withdrawal) (Wilder, Daniel) (Entered: 03/15/2013)
04/02/2013	27	Order Granting Motion To Avoid Lien with Branch Banking & Trust Co. (Related Doc # 24) Signed on 4/2/2013. (Stratigos, C) (Entered: 04/02/2013)
		* * *
04/23/2013	29	Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (Entered: 04/23/2013)

04/23/2013	30	Financial Management Course Certificate filed by Connie F. Appling, R. Scott Appling (related document(s)12 Meeting of Creditors Chapter 7 No Asset) (Wilder, Daniel) (Entered: 04/23/2013)
04/30/2013		Chapter 7 Trustee's Report of No Distribution: I, William Flatau, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 3 months. Assets Abandoned (without deducting any secured claims): $ 0.00,

		Assets Exempt: $ 551900.00, Claims Scheduled: $ 1443514.99, Claims Asserted: Not Applicable, Claims scheduled to be discharged without payment (without deducting the value of collateral or debts excepted from discharge): $ 1443514.99. (Flatau, William) Modified on 1/29/2015 (Thiel, J.). (Entered: 04/30/2013)
05/14/2013	31	Order Discharging Both Debtors . Signed on 5/14/2013 (Miller, M.) (Entered: 05/14/2013)
		* * *
10/24/2014	33	FINAL DECREE. The estate of the above-named debtor(s) has been fully administered. IT IS ORDERED THAT: the current and any former case or interim trustee is discharged as trustee of the above-named debtor and the bond is cancelled; the case of the above-named debtor(s) is closed. THIS IS A TEXT ONLY ORDER. Signed on 10/24/2014. (Auto7) (Entered: 10/24/2014)
10/27/2014	34	Order Reopening Case . Signed on 10/27/2014 (Thiel, J.) (Entered: 10/28/2014)
		* * *

RELEVANT DOCKET ENTRIES

U.S. Bankruptcy Court
for the Middle District of Georgia
Case No. 13-03042

Date Filed	#	Docket Text
04/23/2013	1	Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (Entered: 04/23/2013)
		* * *
04/26/2013	2	Amended Complaint *CM/ECF Electronic Filing of Complaint* by Bruce B. Weddell on behalf of Lamar, Archer & Cofrin, LLP against R. Scott Appling. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP) (Weddell, Bruce) (Entered: 04/26/2013)

04/26/2013	3	Amended Complaint *Amended CM/ECF Electronic Filing of Complaint* by Bruce B. Weddell on behalf of Lamar, Archer & Cofrin, LLP against R. Scott Appling. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP) (Weddell, Bruce) (Entered: 04/26/2013)
		* * *
04/29/2013		Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Pre-Trial Conference set for 7/2/2013 at 01:30 PM at Athens Courthouse. (Stratigos, C) (Entered: 04/29/2013)
		* * *
05/28/2013	7	Motion to Dismiss Adversary Proceeding filed by Defendant R. Scott Appling (Wilder, Daniel) (Entered: 05/28/2013)

05/28/2013	8	Answer to Complaint filed by Defendant R. Scott Appling (Wilder, Daniel) (Entered: 05/28/2013)
		* * *
06/11/2013	9	Amended Complaint by Robert C. Lamar on behalf of Lamar, Archer & Cofrin, LLP against R. Scott Appling. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP) (Lamar, Robert) (Entered: 06/11/2013)
06/11/2013	10	Response with opposition to Motion to Dismiss filed by Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)7 Motion to Dismiss Adversary Proceeding) (Lamar, Robert) (Entered: 06/11/2013)
		* * *
06/17/2013	11	Motion to Amend Complaint (Related document(s) 9 Amended Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP. (Entered: 06/17/2013)
		* * *

06/24/2013	13	Response with opposition *Reply to Plaintiff's Response (Dkt. 10) to Motion to Dismiss* filed by Defendant R. Scott Appling (related document(s)7 Motion to Dismiss Adversary Proceeding) (Wilder, Daniel) (Entered: 06/24/2013)
06/24/2013	14	Response with opposition filed by Defendant R. Scott Appling (related document(s)11 Motion to Amend Complaint) (Wilder, Daniel) (Entered: 06/24/2013)
06/24/2013	15	Answer to Complaint *(Answer to Amended Complaint)* filed by Defendant R. Scott Appling (Wilder, Daniel) (Entered: 06/24/2013)

* * *

07/02/2013		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, Hearing Set on Complaint, 7 Motion to Dismiss Adversary Proceeding filed by Defendant R. Scott Appling, 10 Response With Opposition filed by Plaintiff Lamar, Archer & Cofrin, LLP, 11 Motion to Amend Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 13 Response With Opposition filed by Defendant R. Scott Appling, 14 Response With Opposition filed by Defendant R. Scott Appling). Order/Withdrawal Follow-up Due: 7/23/2013. (NeSmith, Fran)JUDGE TO DECIDE. (Entered: 07/05/2013)
07/10/2013	16	Opposing Brief filed by Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)7 Motion to Dismiss Adversary Proceeding) (Weddell, Bruce) (Entered: 07/10/2013)
09/19/2013	17	Order Granting Motion To Amend Complaint(RE: Related Doc # 11) amending (related documents:9 Amended Complaint). Signed on 9/19/2013. (Hooper, D.) (Entered: 09/20/2013)

09/19/2013	18	Memorandum Opinion (related document(s)7 Motion to Dismiss Adversary Proceeding. Signed on 9/19/2013 (Hooper, D.) (Entered: 09/20/2013)
09/19/2013	19	Order Denying Motion to Dismiss Adversary Proceeding (Related Doc # 7) Signed on 9/19/2013. (Hooper, D.) (Entered: 09/20/2013)
		* * *
10/07/2013		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 20 Scheduling Order). Order/Withdrawal Follow-up Due: 10/28/2013. (NeSmith, Fran)90 DAYS TO COMPLETE DISCOVERY, SCHEDULE STATUS CONF. (Entered: 10/07/2013)
		* * *
11/21/2013	27	Motion to Quash filed by Defendant R. Scott Appling Hearing scheduled for 12/18/2013 at 01:30 PM at Athens Courthouse (Wilder, Daniel) (Entered: 11/21/2013)

11/21/2013	28	Response with opposition filed by Defendant R. Scott Appling (related document(s)24 Certificate of Service) (Wilder, Daniel) (Entered: 11/21/2013)
		* * *
12/10/2013	30	Response with opposition *to Defendant's Objections to Notice of Deposition* filed by Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)28 Response With Opposition) (Lamar, Robert) (Entered: 12/10/2013)
		* * *
01/21/2014	44	Notice of Withdrawal filed by Defendant R. Scott Appling (related document(s)27 Motion to Quash) (Wilder, Daniel) (Entered: 01/21/2014)
01/21/2014	45	Notice of Withdrawal filed by Defendant R. Scott Appling (related document(s)28 Response With Opposition) (Wilder, Daniel) (Entered: 01/21/2014)

01/22/2014	Adversary case 13-03042. (65 (Dischargeability - other)) Complaint by Lamar, Archer & Cofrin, LLP against R. Scott Appling . Receipt Number fnp, Fee Amount $293 (Clowers, V.) (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Status hearing to be held on 3/10/2014 at 02:30 PM at Macon Courtroom A. (Hooper, D.) *Status conference will be held in Macon via conference call. (Entered: 01/22/2014)*
	* * *
03/10/2014	Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 42 Order on Motion to Extend or Shorten Time, Hearing Set on Complaint). Order/Withdrawal Follow-up Due: 3/31/2014. (NeSmith, Fran)90 DAYS, SCHEDULE STATUS HEARING. WILL BE HELD BY PHONE CONFERENCE IN MACON. (Entered: 03/10/2014)
	* * *

	50	Motion to Compel Defendant's to Deposition filed by Plaintiff Lamar, Archer & Cofrin, LLP (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3) (Lamar, Robert) (Entered: 04/14/2014)
		* * *
04/28/2014	53	Response with opposition filed by Defendant R. Scott Appling (related document(s)50 Motion to Compel) (Wilder, Daniel) (Entered: 04/28/2014)
		* * *
04/30/2014		Hearing Held and Continued to Final Disposition Calendar. Reason: CONSENT ORDER TO BE FILED. (related document(s)50 Motion to Compel filed by Plaintiff Lamar, Archer & Cofrin, LLP, 53 Response With Opposition filed by Defendant R. Scott Appling). Final Disposition Hearing scheduled for 6/10/2014 at 02:30 PM at Athens Courthouse (NeSmith, Fran) (Entered: 05/01/2014)
		* * *

06/16/2014		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP, 46 Scheduling Order). Order/Withdrawal Follow-up Due: 7/7/2014. (NeSmith, Fran)SCHEDULE TRIAL FOR 1 DAY IN AUGUST OR SEPTEMBER. (Entered: 06/16/2014)
		* * *
09/18/2014	61	PDF with attached Audio File. Court Date & Time [9/18/2014 9:37:49 AM]. File Size [54360 KB]. Run Time [03:46:30]. (CourtSpeak). (Entered: 09/18/2014)
09/18/2014		Hearing Continued (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Hearing scheduled for 9/23/2014 at 01:30 PM at Macon Courtroom A (NeSmith, Fran) REMAINDER OF TRIAL WILL BE HEARD IN MACON. (Entered: 09/19/2014)
09/23/2014	62	PDF with attached Audio File. Court Date & Time [9/23/2014 1:36:03 PM]. File Size [40529 KB]. Run Time [02:48:52]. (CourtSpeak). (Entered: 09/23/2014)

09/23/2014		Hearing Held (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Order/Withdrawal Follow-up Due: 10/14/2014. (NeSmith, Fran)20 DAYS TO BRIEF JUDGE WILL DECIDE. (Entered: 09/25/2014)
10/13/2014	63	Supporting Brief filed by Defendant R. Scott Appling (related document(s) Hearing Held) (Wilder, Daniel) (Entered: 10/13/2014)
10/14/2014	64	Letter by David W. Davenport to Judge James P. Smith. (Spilman, C) (Entered: 10/14/2014)
10/14/2014	65	Letter by Judge James P. Smith to David Davenport and Daniel Wilder. (Spilman, C) (Entered: 10/14/2014)
11/21/2014		Transcript Request from David Davenport of Lamar Archer for hearings held on 9/18/14 & 9/23/14. Payment has been made to the transcription agency, Information transmitted to the transcriptionist on 11/21/2014. (Thomas, R.) (Entered: 11/21/2014)

12/22/2014	66	Transcript of Hearing held on 9/18/2014. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Redacted Transcript Due 1/22/2015. TRANSCRIPT IS RESTRICTED UNTIL 3/23/2015. (Thomas, R.) (Entered: 12/30/2014)
12/22/2014	67	Notice of Official Filing of Transcript of Hearing Held on 9/18/.2014 (related document(s)66 Transcript of Hearing). (Thomas, R.) (Entered: 12/30/2014)
12/22/2014	68	Amended Notice of Official Filing of Transcript of Hearing Held on 9/18/2014 (related document(s)66 Transcript of Hearing). (Thomas, R.) Amended to correct adversary number listed in notice. (Entered: 12/30/2014)
12/22/2014	70	Notice of Official Filing of Transcript of Hearing Held on 9/23/2014 (related document(s)66 Transcript of Hearing). (Thomas, R.). Related document(s) 69 Transcript of Hearing. (Entered: 12/30/2014)

12/22/2014	69	Transcript of Hearing held on 9/23/2014. (related document(s)1 Complaint filed by Plaintiff Lamar, Archer & Cofrin, LLP). Redacted Transcript Due 1/30/2015. TRANSCRIPT IS RESTRICTED UNTIL 3/30/2015. (Thomas, R.) (Entered: 12/30/2014)
		* * *
01/09/2015	74	Letter to Honorable James P. Smith Re: filed by Plaintiff Lamar, Archer & Cofrin, LLP (Lamar, Robert) (Entered: 01/09/2015)
01/12/2015	75	Letter by Judge James P. Smith to David Davenport and Daniel Wilder. (Spilman, C) (Entered: 01/12/2015)
01/21/2015	76	Letter to Honorable James P. Smith Re: filed by Plaintiff Lamar, Archer & Cofrin, LLP (Lamar, Robert)*See document 77 for correct event* Modified on 1/22/2015 (Thiel, J.). (Entered: 01/21/2015)

01/21/2015	77	Trial Brief filed by David W. Davenport on behalf of Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)1 Complaint) *Re-docketed document 76 to correct event* (Thiel, J.) (Entered: 01/22/2015)
03/10/2015	78	Memorandum Opinion (related document(s)1 Complaint. Signed on 3/10/2015 (Martin, D.) (Entered: 03/10/2015)
03/10/2015	79	Order granting (related document(s)1 Complaint. Court to followup on Final Report or closing:3/24/2015. Signed on 3/10/2015 (Martin, D.) (Entered: 03/10/2015)
		* * *
03/23/2015	82	Notice of Appeal. . Fee Amount $298 filed by Defendant R. Scott Appling (related document(s)78 Memorandum Opinion, 79 Order on Complaint) Appellant Designation due by 04/6/2015. (Wilder, Daniel) (Entered: 03/23/2015)
		* * *

03/24/2015	83	Transmittal of Initial Notice of Appeal to District Court (related document (s)82 Notice of Appeal filed by Defendant R. Scott Appling). (Clough, Diana) (Entered: 03/24/2015)
		* * *
04/06/2015	87	Appellant Designation of Contents For Inclusion in Record On Appeal *and Statement of Issues* filed by Defendant R. Scott Appling (related document(s)82 Notice of Appeal) Appellee designation due by 04/20/2015. Transmission Due by 05/6/2015. (Wilder, Daniel) (Entered: 04/06/2015)
04/20/2015	88	Letter to Honorable James P. Smith Re: filed by Plaintiff Lamar, Archer & Cofrin, LLP (Davenport, David) **re-docketed entry - see 89 Appellee designation of record on Appeal** (Entered: 04/20/2015)
04/21/2015	89	Appellee Designation of Contents for Inclusion in Record on Appeal filed by Plaintiff Lamar, Archer & Cofrin, LLP (in letter form) (related document(s)82 Notice of Appeal) (Kennell, E.) (Entered: 04/21/2015)

04/22/2015	90	Transmittal of Complete Record on Appeal to District Court (related document(s)82 Notice of Appeal filed by Defendant R. Scott Appling). (Taylor-Owens, M.) (Entered: 04/22/2015)
04/23/2015	91	Addendum to Record on Appeal to include Exhibits emailed to Amy Stapleton at District Court. (related document(s)82 Notice of Appeal) (Taylor-Owens, M.) (Entered: 04/23/2015)
05/04/2015	92	Transmittal of Addendum to Appeal to include Exhibits 5 and 6. (related document(s)82 Notice of Appeal) (Taylor-Owens, M.) (Entered: 05/04/2015)
03/29/2016	93	Final Order By District Court. Ruling of District Court: The Court agrees with the decision of the Bankruptcy Court. Accordingly, it is HEREBY ORDERED that the decision of the Bankruptcy Court be AFFIRMED. (related document(s)79, 78 Memorandum Opinion, Order on Complaint. Appeal follow-up due by 4/28/2016. Signed on 3/28/2016 (Entered: 03/29/2016)

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02/15/2017	95	Order from 11th Circuit Court of Appeals Re: Appeal BK Case Number 13-3042-JPS and District Ct Case Number 15-00031-CAR and 11th Circuit Case Number 16-11911 Reversing and Remanding . Signed on 2/15/2017 (Clough, Diana) (Entered: 02/16/2017)
03/06/2017	96	Order By District Court on Bankruptcy Appeal. Pursuant to the decision of the 11th Circuit, this Court's Order entered on March 28, 2016 is reversed, and the case is remanded to the Bankruptcy Court for further proceedings consistent with said decision. Follow-up due by 4/5/2017. Signed on 3/6/2017 (Clough, Diana) (Entered: 03/07/2017)
04/04/2017	97	Joint Motion To Stay (related documents 96 Order District Court re: Appeal) filed by Plaintiff Lamar, Archer & Cofrin, LLP and Defendant R. Scott Appling (Lamar, Robert) Modified on 4/6/2017 (Harris, D.). *See amended document 99. (Entered: 04/04/2017)*

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04/05/2017	99	Joint Amended Document - Amended to correct some text within the original motion filed by Defendant R. Scott Appling , Plaintiff Lamar, Archer & Cofrin, LLP (related document(s)97 Motion To Stay) (Harris, D.) (Entered: 04/06/2017)
04/17/2017	100	Consent Order Granting Motion To Stay (Related Doc # 97) Signed on 4/17/2017. (Harris, D.) (Entered: 04/18/2017)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA

LAMAR, ARCHER & COFRIN, LLP, Plaintiff, vs. R. SCOTT APPLING, Defendant.	CASE NO: 13-03042 ADVERSARY Athens, Georgia Thursday, September 18, 2014 (9:37 a.m. to 12:22 p.m.) (1:31 p.m. to 2:48 p.m.)

MAIN CASE: 13-30083
R. SCOTT APPLING AND CONNIE F. APPLING

TRIAL PROCEEDINGS

BEFORE THE HONORABLE JAMES P. SMITH,
UNITED STATES BANKRUPTCY JUDGE

* * *

[13]

* * *

DIRECT EXAMINATION

BY MR. DAVENPORT:

Q Mr. Gordon, would you state your name and occupation, residence for the Court.

A My name is --

THE COURT: Let's don't put his residence in. There's a hesitancy in federal court now to give residence address unless there's some kind of relevance to the case, so --

A My name is Walter James Gordon, Senior. I'm an attorney in Hartwell, Georgia.

Q Do you have your own law firm in Hartwell, Georgia?

A I do.

Q Are you also involved with the -- representing the City in Hartwell?

A Hart County.

Q Or the county. And what's your --

A Yes, I'm the county attorney for Hart County.

Q Okay. Now, you're familiar with the underlying cases involved in this bankruptcy --

A I am. **[14]**

Q Okay. And you know Mr. Appling?

A I do.

Q Can you tell the Court -- first of all, you were co-counsel in the underlying suit of *Scott Appling and Hartwell Enterprises versus John Davis, Herrington, Seeding, Norga*, and the other Defendants?

A Yes.

Q Okay. How did you come to be co-counsel in that case?

A Mr. Appling had consulted with me. He had come to me after he had engaged in a -- the purchase of a business, Herrington Seating, and another smaller business. And he was concerned that he had overpaid for the business or that certain things were not as he believed them to be and wanted to talk about basically rescinding, or coming out of, the

arrangement that he had entered into. When I talked with him, I explained to him that I just didn't have the -- you know, I have -- at that time I had one associate and several clerks but practiced by myself, and at the time I didn't feel that I had the time or the depth in my practice to do what needed to be done. It was a several million dollar deal and he had a significant payment that was looming -- I think it was coming up within the next month -- and I knew that I would not be able to devote the time or effort that a case like that would need. It was just too complex for me. So I had referred him to Mr. Lamar. I later learned that he had hired Mr. Lamar, and Mr. Lamar talked to me **[15]** about assisting in a local counsel or co-counsel position, which I was happy to do.

Q Okay. And when -- what -- when was that? Was that in July of 2004? Just to keep this moving.

A As best I remember. It was -- it could have been June. It was June or July of 2004.

Q And did Mr. Appling, on his own behalf and his company's behalf, in fact hire you as local counsel, co-counsel?

A Yes.

Q In addition to Lamar, Archer, And Cofrin?

A Yes.

Q And did you in fact perform and do work on their -- the 13 Defendant's case --

A I did.

Q Okay. And were you aware as the case progressed during the time range in March that

Lamar, Archer, and Cofrin had sent a letter to Mr. Appling regarding his past due fees?

A Yes, I believe I was copied on that letter.

Q Okay. And at that time, were you owed fees also?

A Yes.

Q How much were the fees that you were owed?

A In March of 2005, Mr. Appling had made a payment to me, perhaps two, but at that time in March of '05, my time records showed that I was owed approximately 17 or $18,000.

Q Okay. And in the letter that Mr. Lamar sent on behalf of **[16]** Lamar, Archer, And Cofrin, are you aware that he threatened to have the firm withdrawn unless payment --

A Oh, yes. If I recollect that letter, Lamar, Archer, And Cofrin was owed close to 70 or maybe even $75,000 at the time. There had not been a payment made for some period of several months. And Mr. Lamar was concerned that he might not be paid and did in fact inform Mr. Appling that he would be compelled to withdraw if arrangements weren't made for payment.

Q Okay. Was there a meeting regarding the unpaid fees that occurred in your office shortly after that letter?

A Yes. We met in my conference room in my office in Hartwell. We met with -- Mr. Lamar and I met with Mr. Appling.

Q Okay. And can you tell the Court briefly what was discussed about the fees at the meeting and what Mr. Appling stated?

A We talked about a number of things. But just confining it to the discussion of fees that were owed, what I recall is that Mr. Appling had explained that he was in a -- you know, that he was having cash flow difficulties, that he was having to pour a great deal of money into the business. And as I had remembered, we had obtained an injunction that had basically deferred payments of $21,000 a month that he would have had to make in addition to a lump sum payment of I believe it was a hundred thousand that he would have had to make back in either July or early August of '04. But he had a great faith in his [17] business even then. But he told us that he had a tax refund that would be coming, that he had talked with an accountant who had explained to him a method by which he could amend apparently some older tax return, or previous tax return, and receive a substantial refund. And Mr. Appling said that that's how he would pay both Mr. Lamar and me if we would continue.

Q Did he mention a specific amount that he promised that that refund would be and that he would pay out of?

A He told us that he felt like it would be approximately a hundred thousand dollars. I'd asked him if he had the return. I don't think it had been prepared at that point.

Q Did you -- did he promise to pay Lamar, Archer, And Cofrin out of that refund?

A Yes.

Q Okay. Did, to your knowledge, Lamar, Archer, And Cofrin and your firm continue then to represent Mr. Appling?

A We did.

Q Okay. And are you aware of -- were there -- and subsequent to that, were you aware of a meeting in November of that same year, 2005, between Lamar, Archer, And Cofrin and Mr. Appling?

A Yes. I believe that Mr. Appling wanted to talk with Mr. Lamar about a number of things regarding the case and the fees. I did not go to that meeting. Atlanta basically -- the offices of Lamar, Archer, And Cofrin is about two hours from [18] Hartwell. That would have been four hours of travel time and I did not feel it necessary to go to that meeting myself.

Q Now, between the March meeting in your office and the November meeting at Lamar, Archer, And Cofrin's office, did Mr. Appling ever tell you or to your knowledge Lamar, Archer, And Cofrin that he had in fact received the tax refund?

A No.

Q Did he ever tell you that the amount was different than the hundred thousand dollars that he had represented to you at the March meeting?

A No.

Q Did he ever tell you that he had spent any of that tax refund?

A Oh, no.

Q Okay. Did you continue representing him subsequent to that November meeting --

A I did. We --

Q And Lamar, Archer, And Cofrin also?

A Yes. In fact, we were very close to getting this case settled even at that November meeting. There was still some hanging matters but we were close to getting it resolved. We -- both firms continued to work on his behalf; and if I recollect correctly, we had reached a settlement in principle the following January. And then I believe it was March when we finally were able to get everybody's name on the settlement [19] document and have it filed with the Court. I know that my fees at that time -- you know, by the time the case had been fully resolved, my fees were in the neighborhood of 26,000. And I don't know exactly what the Lamar, Archer fees were, but I'm sure that they were considerably more than they had been, you know, when we had been told about this tax refund.

Q Now --

A But we did continue to work on the case based on that promise that Mr. Appling had made that he would dedicate that tax refund to payment of attorneys' fees.

Q And was it your understanding throughout that time period from March of 2005 until March of 2006, when the case settled, that both your firm and Lamar, Archer, And Cofrin would be paid out of the tax return?

A Yes.

Q And even up to the date when the case was finally settled and dismissed, had Mr. Appling

advised you or to your knowledge Lamar, Archer, And Cofrin that he had received the tax refund?

A No. If I remember that right, Mr. Davenport, there was something about -- there was some delay in filing it because I was a little bit interested in that naturally. You know, I have a small firm and the loss of $26,000 is not something that I can easily stand. Nevertheless, we were so close to the end of the case at that point it made sense to me for us to continue to work with the promise of payment, even if the **[20]** payment had not been made in full -- even if he hadn't been able to make it in full. You know, it seemed to me that given what we did -- you know, if I remember this right, we actually retroactively cut a million and a half dollars off the purchase price, which he had agreed to with counsel. Not me or you, but with advice of counsel he had entered into this transaction. And we were able to get the price stripped by a million and a half dollars, as well as the cash flow issue. And we got -- we had a -- we got a temporary injunction that prohibited -- or caused him not to have to pay $21,000 a month on one loan and then a lump sum of a hundred thousand dollars on another loan that was in -- that involved some business broker that he was -- had a relationship with. And, you know, that was a -- in my mind a significant win. Mr. Appling didn't see it that way.

Q Do you remember when you first learned that he had in fact received this tax refund?

A I believe that it was sometime in May or June of '06. You know, we had completed the work, everything had basically been done at that time. I was feeling rather insecure concerning being paid but I had that faith that he would do as he told us he

would do and that he would pay us the tax refund. I later learned that he had received it, you know, after several times of telling me that he was waiting, that it was, you know, that -- I think that he even told me that the accountant had messed it up and that he had to go back and have it done again, or [21] maybe he went back another year. But I know he was most unhappy with the accountant who had told him he could receive a refund and who advised him to seek it, very unhappy with him because he had to do it again.

THE COURT: Let me --

A In any event --

THE COURT: -- stop you, excuse me --

THE WITNESS: Excuse me.

THE COURT: -- Mr. Gordon. Mr. Davenport, a young lady just walked in the back of the room. I don't know if she's a witness or if she needs to be excluded or --

MR. DAVENPORT: She's not a witness.

THE COURT: Okay, go ahead. Excuse me, Mr. Gordon.

THE WITNESS: Thank you, Judge.

BY MR. DAVENPORT:

A So I didn't know, you know, when or if this tax refund was coming but I know I was interested in it as certainly Mr. Lamar was. And it was some time in I think May or June of '06 that I learned that Mr. Appling had in fact received it, that he had in fact spent it, and that we -- neither you -- neither me nor your firm had been paid.

Q Did Mr. Appling ever call you and tell you personally that he had received the tax refund?

A No.

Q Did he ever call you and say, I'm not going to pay you out **[22]** of the tax refund?

A Mr. Davenport, we may have had a conversation sometime in June. I really don't remember.

THE COURT: June of what year, Mr. Gordon?

THE WITNESS: That would have been '06.

BY MR. DAVENPORT:

Q And that would have been after the case had been settled and --

A That's right.

Q -- resolved and dismissed.

A That's right.

Q Okay. And do you --

A I just remember being very disappointed when I learned that he had received the tax refund and had not used it in the way that he had promised us that he would.

Q And were you in, if not daily, constant communication with either myself or other lawyers at Lamar, Archer, And Cofrin regarding the case and sometimes the unpaid fees?

A Yes.

Q Were you ever --

A Well, frequent I would say. Maybe -- perhaps not constant, but frequent communication.

Q Were you ever advised by anyone at Lamar, Archer, And Cofrin prior to the resolution of the lawsuit that Mr. Appling had in fact received the tax refund first of all? **[23]**

A No.

Q Were you ever advised by anyone at Lamar, Archer, And Cofrin prior to the resolution of the lawsuit in March of 2006 that he had advised Lamar, Archer, And Cofrin that he wasn't going to pay Lamar, Archer, And Cofrin --

A No.

Q -- out of that lawsuit?

A Oh, no. In fact, had he -- had I been advised of that, I don't think I would have continued in the case.

Q Well, I was going to ask you what would you -- had he so advised you prior to the resolution of the case, what would you have done on behalf of your law firm?

A I would have withdrawn.

Q Okay. And you're aware that Lamar, Archer, And Cofrin had already threatened to do that a year earlier, in March of 2005, for non-payment of fees, correct?

Q Yes.

MR. DAVENPORT: Okay, no further questions.

* * *

[29]

* * *

BY MR. WILDER:

Q So let's ask in the order I was going to do. Now, did you have any past work with Mr. Lamar where he had referred you cases as an attorney or you'd worked as co-counsel?

A I have known Mr. Lamar for quite some time. We actually had attended Emory together. I had kept up with Mr. Lamar from time to time. I actually did a real estate transaction for [30] Mr. Lamar when he bought a house up in Hart County. I don't remember being co-counsel with Mr. Lamar on any matter. You know, I certainly have talked to him about a few things, but I don't think we'd actually been co-counsel in a case at that point.

Q Okay. Have you been since, or is this basically a one-shot deal that you were this involved in a case?

A Since that time, we have collaborated on a rather large case in the federal court in the Northern District.

Q You still have an ongoing business relationship with him, would it be fair to say that?

A We don't have any current cases together.

Q Okay, now, throughout the case, you were -- you've already said part of this. You were generally aware of Mr. Appling's business and its financial difficulties; is that an accurate statement?

A Well, I was aware of what Mr. Appling talked to me about, yes.

Q But it said you -- that your billing records show review of financials of this business on several occasions. Would that be accurate, you'd looked at the financials of this business?

A Well, most of that would have been the financials of the prior owner because that was one of the big concerns that we all had. **[31]**

Q I'll cite to you on September 21st, 2004, you logged in a half an hour for review client's bank statements.

A Okay.

Q And there are several other notations, "Review Appling bank records" on October 4th, 2004.

A Okay.

Q So you were generally familiar with Mr. Appling's financial wherewithal at this point?

A I was familiar with what he brought to me.

Q Okay. Do you know a Mike Strickland? That name ring a bell?

A I believe that that was an accountant that Mr. Appling had employed early in this case. We actually -- I believe there was a deposition of Mr. Strickland and it became fairly clear after that deposition that Mr. Strickland was not the man to handle this case.

Q On October the 15th, 2004, your records show that you reviewed Mr. Strickland's financial report.

A Okay.

Q That -- and do you remember what his report generally said. Business wasn't doing well.

A I have not reviewed any of these documents, sir, since the time that, you know, since whatever time that I showed on my time record.

Q Okay. Do you know a Mr. Porter? [32]

A I do. Mr. William Porter?

Q What does he do?

A Mr. William Porter is a business evaluation expert and --

Q He was hired in this case, in the --

A Pardon me?

Q He was hired in the case; is that right?

A He was higher in the case?

Q He was hired by --

A Yes.

Q -- Mr. Appling through --

A Yes.

Q -- Mr. Lamar?

A Yes.

Q Okay. And he gave a business valuation of the case.

A Yes. We hired him because of -- Mr. Strickland wasn't able to do what we really needed to do.

Q Okay. And do you remember the substance of Mr. Porter's report?

A I don't remember it in any detail.

Q Okay. If I made the characterization that his report says that the business was worth

substantially less than the 2.3 million offered for it, would that sound -- does that refresh your recollection of it?

A Oh, yeah. I mean, that -- you know, we hired him to show tha' - **[33]**

Q Okay.

A -- or to try to come up with a true and accurate value of the business that Mr. Appling had agreed to pay for.

Q So the point of the suit was to show that the business was worth nowhere near what he paid for it.

A Yes.

Q And with that you got -- you had access to financial information both for the business and Mr. Appling the whole time.

A I had access to whatever was relevant to the case, yes.

Q Okay. Now, March, 2005 you mentioned a meeting in your office. You recollect that Mr. Lamar's firm was owed 75,000.

A May not have been that much. It was something close to that. It may have been 65,000.

Q Okay. If I tell you 60,000, does that sound close enough ballpark?

A Sixty thousand?

Q Does that sound close enough to ballpark for you?

A It could have been. I really don't know. I know it was a substantial amount. It was more than what

was owed to me but they had done a lot more work than I had done.

Q Okay. Did you take any notes about that meeting?

A I may have.

Q Okay. Do you have any notes here about that meeting?

A No, I do not. **[34]**

Q Okay. Your billing record, I will tell you, on that day just says "meeting with Lamar and Mr. Appling" --

A Yes.

Q -- two hours.

A Yes.

Q Okay. So you have no detailed notes of that --

A I didn't say that, sir. I said that I did not bring any notes with me.

Q Okay. Did you send any letter to Mr. Appling after that meeting reflecting the agreement that you say was made?

A I don't recall. If I did, it's in my time record which you are apparently looking at.

Q Okay. Now, you said that you did not think the tax return was prepared by the time of that hearing -- or by the time of that March meeting.

A That March meeting? I don't think so.

Q So then Mr. Appling really didn't know how much he was getting back.

A No. he told us he was getting a hundred thousand dollars.

Q But you knew the tax return wasn't prepared, so you knew that wasn't finalized.

A I knew what Mr. Appling told us, sir. That's what I knew.

Q Did you know that Mr. Strickland was preparing it?

A I believe he told me that, yes.

Q Okay. And you've already told me you had a dim view of **[35]** Mr. Strickland's numbers.

A No. I had a dim view of Mr. Strickland's ability to testify in a rather complicated case given what -- given the outcome of his deposition. It had nothing to do with his numbers. It had to do with the way that he testified.

Q I believe the wording you used earlier was he -- you had been -- that the method by which the tax return would be calculated had been explained. Somebody had explained the method to you.

A I'm sorry, what?

Q Mentioned earlier that the -- that what had been explained to you by Mr. Appling at that meeting was the method by which the tax refund would be gained. I believe your quote --

A I guess you could say that.

Q -- was to explain that --

A I mean, I said what I said. As I recall it, I said that he had explained that this accountant had disclosed a way that he could go back and amend

some tax returns or maybe -- and it may have been current tax returns. But there was a way that he could obtain a refund, a substantial tax refund.

Q Okay.

A I'm not an accountant, though.

Q Okay. And then you were -- okay. And you were owed some money at that time, too.

A Yes. **[36]**

Q Were you paid something after that?

A Not that I recollect. I may have been paid something. I know that at the end of this whole matter I showed a loss of close to $26,000.

Q Okay. It looks like -- correct me if I'm wrong, it looks like you sent two invoices total.

A Sir, if you say so. I mean, if that's what I did, I did. I really -- I did not go back and look at my billing records.

Q Okay. Now, one thing ask now, your last invoice in this case is dated June 30th, 2005.

A Okay.

* * *

[40]

* * *

BY MR. WILDER:

Q Mr. Gordon, so do you have any knowledge of when those -- that tax refund that was referred to by -- that you talked about in the March meeting was actually completed?

A Was received by Mr. Appling?

Q Or was actually completed and sent in to the IRS or done by Mr. Strickland at some point?

A No.

Q Okay. So no knowledge -- so you don't know whether it was done before or after billing or anything like that. **[41]**

A I know that in March of '05 Mr. Appling promised myself and Mr. Lamar that he would complete payment to us when he received a substantial tax refund which he expected to be in the neighborhood of a hundred thousand dollars.

Q Now --

A I know that I never received any of those funds. And my recollection is that it was June of the following year that I was told that no funds were -- you know, that basically the funds had been spent.

Q So you did not go to the November, 2005 meeting --

A No.

Q -- is what you -- you said the case was close to settling in November, 2005; is that right?

A In when in of '05?

Q Now I wrote it down as November, 2005 you thought the case was close to settling.

A It was toward the end of the year or the first of January of '06.

Q But now that contradicts the billing records, doesn't it?

A I didn't bill -- this bill stops on the date that I told you, which was June of '05 -- June 13th of '05.

Q Did you ever send any letters to Mr. Appling trying to collect your bill after June of '05?

A I don't remember.

Q Okay. And you never -- [42]

A I don't think I did.

Q And you never sued him or --

A I certainly contemplated it but no, I did not.

Q Okay.

A I did not have a signed fee agreement. I abandoned one of my own firm rules in that I did not have a signed fee agreement. Mr. Appling's mother was a church friend of mine. His wife was a friend of mine and --

Q Now, in --

A -- in retrospect I should have had a signed fee agreement; and, if I had, I would have sued.

Q Now, in the later -- you -- were you involved in the later fee dispute where Lamar, Archer sued Mr. Appling to collect on fees?

A I know that that was done and I -- there were some depositions that were held in my office --

Q Was there --

A -- that I was not a part of I don't -- as I don't recall being a part of that, but --

Q Okay. Were you involved in -- did you attend any depositions in your office in that case?

A I may have. If you can help refresh my memory on that, I didn't keep records of that because I --

Q Was there a --

A -- had not been paid for what I'd done before. **[43]**

Q Was there a deposition in 2012 with I believe Mr. McArthur was representing Mr. Appling --

A Yes.

Q -- where there was an altercation between you and Mr. Appling in your office?

A There was a comment which I wanted to make to Mr. Appling which I will now explain to you.

Q So I guess that's my question, there --

A Mr. Appling --

Q -- was an altercation between you and Mr. Appling in your office?

A I wouldn't call it an altercation.

Q Well, somebody shoved --

A There was a --

Q -- somebody else.

A There was a comment that I made, and I'll tell you what it was. I had been told by another client of mine that Mr. Appling and his wife were on a cruise ship. That had occurred within a few months prior to that depositions. That when Mr. Appling learned that these folks that he was seated with on this cruise ship were from Hartwell, my home town, he then began to gratuitously bash me and my firm and Mr. Lamar and his firm, and he went on and on and

on. And these people came back to me and said, "What is going on?"

Q So this is all information you heard as hearsay from a [44] third party?

A I then -- I did at the close of this deposition, I had a comment that I wanted to make to Mr. Appling which was that I was aware of what he had said, that I wanted him to be aware that if he continued to make slanderous remarks, that I would take legal action against him personally. He kept trying to walk out. He didn't want to hear what I had to say. He kept trying to walk out. And then he kind of pushed up his chest and bumped me out of the way. At that point, you know, he left, his lawyer left, and that was it.

Q So it's fair to say you all didn't have the best relationship as recently as 2012?

A Well, when you -- when someone maligns you gratuitously in the middle of the Atlantic Ocean on a cruise ship with somebody that he didn't know but who happened to know me, no, it was not the best relationship, particularly when layered upon the fact that he owed me over $25,000.

* * *

[63]

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BY MR. DAVENPORT:

Q Okay. I have handed you a document labeled Exhibit 2, which is a letter from you to Mr. Appling dated March 9, 2005.

Can you describe the circumstances that caused you to write this letter?

A I can. This is probably my most unusual letter to a client I've ever written in my 30-plus years of practicing law. As we said, we were having -- incurring significant past due balances and we were going to have this meeting, and then -- I don't know -- I guess "March 8th" it says, is a -- there's a letter, my letter to Mr. Appling, and then attached to that, Exhibit 2, is also an email from Mr. Appling to Mr. Davenport.

And we got this email and you showed it to me and, you know, it was -- not only were we not getting paid, but now Mr. Appling was accusing us of just not necessarily running up his fees, and it ended up with a one-page lawyer joke, the last line -- the punch line of which is "the moral of the story is there are three things in life are certain, death, taxes and being screwed by a lawyer." And when we received that we decided that we needed to go ahead and meet -- you know, take this head on. So I took some time and wrote this letter to Mr. Appling, and I think it says a lot about what was -- the issues that were going on in the litigation at the time, and **[64]** the problems we were having with our client at the time. And so I wrote this letter to him and said, "We need to move the meeting up" and we did, in fact, move the meeting up. And it was -- I think it was scheduled for the 18th at the time of this letter, I can't remember whether it took place on that day or shortly thereafter, it would be March 18th or the 20th, 2005 in Walter Gordon's offices in Hartwell.

Q But do you know what the amount of past due fees due to Lamar, Archer, Cofrin were at that time?

A They were in excess of $60,000, I think, $50 or 60,000, they were substantial.

Q Okay. So was there, in fact, a meeting at Walter Gordon's office?

A Yes, there was. It was -- Mr. Appling came in, Walter and myself, and we just began discussing -- it started out with the status of what was going on. Walter was more familiar with that than I, but -- and then we moved to the fees.

Q Okay. And what was the -- can you tell the Court the discussion that was had about the fees?

A Well, first of all, Mr. Appling, at the meeting, unlike the tone of the email which I had gotten -- or which you had gotten back in early March, at the meeting Mr. Appling was very effusive about how -- what a great job we had done, he had just lost his temper and was feeling pressure from all his business things, and was sorry he ever wrote that email, and we were **[65]** doing a great job and, you know, just wanted us to continue doing that, and he realized he had a past due balance and so, you know, we kind of said "thank you" for, you know, burying that hatchet, but we need to go ahead and pursue -- you know, find out what we can do about these fees, that we -- there's a bunch of work coming up and we just can't keep going at this burn rate.

He represented to us that really he had everything he had tied up in the business, there were absolutely no assets of any type available to satisfy our fees, but that he had met with his accountant and that they had already prepared the tax return for, and he -- because of this fraud that had been committed upon him he was going to get a

substantial refund, he represented in excess of $100,000, and that he would pledge that as soon as it came in, that would be sufficient to cover Lamar, Archer, Cofrin's fees, Mr. Gordon's firm's fees and -- that were past due, as well as going forward he would be able to pay the fees out of that refund. And based upon the fact that he said he already had the tax return prepared, it was going to be filed eminently, and he made that pledge. And based upon, also, the fact that there was no other assets there, we agreed -- at least I agreed, on behalf of Lamar, Archer, and Cofrin, that we would continue to work, not pursue collection efforts, not withdraw and we would continue to perform work on his behalf going forward based upon those **[66]** representations.

Q And did Lamar, Archer, and Cofrin, in fact, continue to work on behalf of Mr. Appling and his company's behalf in that case?

A Yes, we did, a substantial amount of work. I think there were depositions taken. Again, you and Walter on the forefront of that, not I, but there was a substantial amount of work done after that amount of time getting ready for what we thought was an upcoming trial.

Q Was there another meeting that, in part, related to the unpaid fees in November of 2005?

A Yes, there was. We got -- most of the litigation had been wrapped up. I think the way it fell down -- fell in was that there were two claims. Basically there was a claim by John Davis for over a million dollars for purchase of the business, and there was a claim by a guy -- with Norga (phonetic) which was

another company that had been -- had some real estate dealings.

So we had settled the -- you and Walter had settled the John Davis portion of it, and then ultimately got -- later on settled in principle the Norga portion. So things were winding down, but Mr. Appling wanted to meet with us, sent us -- I think he sent us an agenda of what he wanted to talk about and the general agenda was he and his wife were going to come to our offices and they wanted to talk about the -- us **[67]** prosecuting a case on his behalf against George Beavers, the CPA that he had been utilizing in conjunction with the purchase of the business, and then also one of the topics was clearing up our fee issue.

And I don't know how much you've gone into it before, but basically when -- all along Mr. Appling had been very interested in pursuing a claim against George Beavers in Toccoa, Georgia, a CPA, and we from the outset said we'll be happy to do that but, you know, one thing at a time, we needed to get this fire put out before we moved to that.

We had used Bill Porter, a very prominent forensic CPA before, and we used Bill in the Hartwell Enterprises case, to get evaluation of ideas and stuff like that, it was expert testimony for that case, and our intent was we were going to use Bill as well based upon his knowledge in that case to pursue the claim on behalf of Mr. Appling against -- and Hartwell Enterprises against Mr. Beavers, and we had agreed to take that on a contingency basis once the Hartwell litigation was wrapped up.

So Mr. Appling was wanting to meet with us to discuss going forward with that, and we had a meeting in our offices, it was Mr. and Mrs. Appling, Mr. Davenport and myself attended that meeting; I think it was on November 2nd.

Q Okay. And specifically can you tell the Court what was discussed about both the unpaid fees and the tax refund? **[68]**

A Sure. Well, it started out talking about the Beavers' case and he was wanting us to proceed with that case. And I said, you know, we'd be glad to, but we need to get paid first, what's -- and what's the status of the refund?

And he represented to us that it had been screw up, that Mr. Strickland, the CPA had either not filed it or somehow misfiled it, and that he had to go back himself and refile it, and he still hadn't gotten the refund, but he expected it at any time.

And then he said, "Well, but let's don't wait on that, let's go ahead and proceed with the Beavers' litigation, we need to go forward with that."

And at that point in time I pushed back and said, and maybe you did, too, David, but I pushed back and said, "No, we're not -- we're going to do this one at a time. We've got $67,000 in fees out there and there's going to be a -- although Mr. Porter had some familiarity with it, there was going to be a lot of new work and professional expert testimony, et cetera, for this CPA malpractice case," and I just refused to proceed with it until we got paid with our fees.

And Mr. Appling was upset that we wouldn't go ahead and said, you know, "It's slam dunk, why don't we do it? Just take your fees out of that." And I refused and said, "No, we're not going to do that, we need to get our fees paid, and then we'll be glad to do it." **[69]**

And so that's basically how the meeting broke up, was he was disappointed that we wouldn't proceed with the Beavers' and I was disappointed we didn't have fees, but we agreed to move forward based upon his representation that he was still waiting on his refund check, and then would give it to us -- apply it to our fees when he got it, and there was, you know, fairly minimal stuff to do in the wrapping up the settlement at that point in time with Norga, but we proceeded to go ahead and do that based upon Mr. Appling's continued representations.

Q What would you have done if Mr. Appling had told you he already had gotten a tax return and either spent it or was not going to pay Lamar, Archer, and Cofrin out of that tax return?

A Well, it would have been a very short meeting and it would have ended at that point in time and we would have started a lien on our files and withdrawn from all of our representation.

Q When did you or Lamar, Archer, and Cofrin first learn that Mr. Appling had, in fact, received a tax refund, and also that he was not going to pay any, not a single dollar, to Lamar, Archer, and Cofrin out of that tax return despite his earlier promise to do so?

A It was sometime in June of 2006, and I don't remember the exact -- how the message was conveyed to me, but I think it may have been in a conversation -- I may have called Scott, but I can't remember exactly, but I learned at that time for the first time in June of 2006 that, you know, the check had come **[70]** and he had spent it, or had used it elsewhere and was not going to pay us anything.

Q And what did you do as a result of learning that he had received the check?

A I wrote him a letter, I sent it certified mail, the letter is dated June 26, 2006. It's -- it's Exhibit 3, you just handed me, in this matter --

Q Yes.

A It's got another Exhibit Number, and that was from Mr. Appling's deposition in the Hart County litigation, I believe.

Q And would you just read to the Court, looking at Page 3, the second paragraph, the -- beginning with -- well, that second paragraph on Page 3.

A The first full paragraph you are referring to?

Q Yes.

A Okay. It says:

> "Not only are the amounts now due pursuant to the original fee agreement entered into among us, they were also the subject of a special agreement and representations by you to induce us to continue representing you through settlement.

> Through my letter to you of March 9, 2005, we gave you formal notice of our intent to withdraw from your representation and of the Gordon law firm's intent to **[71]** withdraw if your outstanding invoices, which included the amounts currently still past due, were not properly brought current or satisfactory arrangements not made for their -- for future payment.
>
> In response to that letter, in a meeting we had with Walter Gordon, you represented to our firm and the Gordon law firm that you were entitled to a refund of taxes from the IRS which would be sufficient to cover all of our outstanding and anticipated invoices, and you promised to utilize that refund when received to pay our outstanding and future invoices. Based upon that representation and that agreement, both the Gordon law firm and this firm did not withdraw from your representation and continued our work, achieving ultimate settlement of your claims.
>
> We have now learned through you that there was, in fact, a tax refund applied for and obtained by you, but that you utilized all of the proceeds of that refund for other purposes, and none of those proceeds were ever pai to either this firm or the Gordon law firm."

Q So is it your recollection that you learned, either in late May or probably June, for the first time about Mr. Appling receiving the tax refund and not paying any monies to Lamar, Archer, and Cofrin? **[72]**

A That is correct. I think it was closer to the date of this letter because I wrote it, I think, in response to just finding that out.

Q Okay. Did Mr. Appling ever call you or write or say anything to you denying that statement that you just read out of that letter?

A No, I -- he did not.

MR. DAVENPORT: Your Honor, just for housekeeping purposes I would move for the admission of Plaintiff's Exhibits 1, 2 and 3.

MR. WILDER: No objections, your Honor.

THE COURT: All right, Plaintiff's 1, 2 and 3 are admitted.

(Plaintiff's Exhibits Numbers 1, 2 and 3 were received in evidence)

MR. DAVENPORT: Thank you, your Honor.

(Counsel confer)

BY MR. DAVENPORT:

Q Did Mr. Appling call you, and did you have any telephone conversation with him subsequent to your sending your letter that you -- of June 26th, which was Exhibit Number 3?

A I did not receive anything. And I also -- give you a letter, which you've handed to me as Exhibit 4.

Q Okay.

A He did not call me or have any other email communication **[73]** that I remember.

Q Okay. Can you tell the Court what Exhibit Number 4 is?

A It's a letter dated July 19, 2006, also sent via certified mail to me from -- on the Hartwell Enterprises, Inc. letterhead signed by Mr. Appling addressing the letter of June 26th that I had sent him.

Q Does he, anywhere in this letter, deny or dispute or answer the statement in your March -- your June 26th letter regarding the agreement to pay Lamar, Archer, and Cofrin out of the tax refund?

A No. As the Court will see, there's no even really reference to the March meeting and any of the promise to pay us the tax refund.

There is, however, a reference regarding the November meeting, and he says -- basically he said after that meeting in our offices with he and his wife -- with him and his wife, that he -- his next course of action was to go to a bankruptcy attorney, and after meeting with that bankruptcy attorney that attorney represented that he not use the refund to pay us, and he states "It should be obvious as to what I chose to do since we are still -- what I chose to do," that's regarding the refund, "since we are still open," that meaning Hartwell Enterprises is still open. So, anyway, that indicates to me that -- well, I'll stop there.

Q Now does -- he gives the date of the meeting as October **[74]** 20th, 2005. Is that the accurate day of the meeting?

A I believe it was November 2nd, that was my recollection in the time records, and also I mean, I

think that's even been admitted in the pleadings by Mr. Appling in the pleadings.

Q Does he state anywhere in this letter that he already told you at the October 20 -- or November 2nd meeting, whichever date you may choose, that he had gotten the tax refund and he wasn't going to pay Lamar, Archer, and Cofrin?

A No. I mean it's -- and now it just -- he just says after the meeting he met with a bankruptcy lawyer, and the bankruptcy lawyers told him, well, maybe you should use it for your business instead of going and giving it to Lamar, Archer, and Cofrin. That's why I was surprised when we got to the position in this case that he started out that -- at that meeting he had told us he had already spent the refund and wasn't going to pay us.

Q Okay. And does this statement on the top of Page 2 that you read, "It should be obvious as to what I chose to do since we are still open," does that contradict any claim that he advised Lamar, Archer, and Cofrin at the November meeting that he had the tax refund and wasn't going to pay Lamar, Archer, and Cofrin out of it, or that he wasn't going to pay Lamar, Archer, and Cofrin out of it even if he had not received it at that time?

A Well, I mean, I'll let the Court draw that conclusion, but **[75]** my -- my under -- you know, my feeling was when I got this letter, I said, "Well, you really did already get it and spend it," that's the first time I knew about it -- kind of a real confirmation that it had come and gone.

I will note that when I took his deposition in the Hart County case he gave yet another

explanation as to when he had made the decision to spend the money. He said in that deposition that he had met with the attorneys that he later hired to represent him regarding Mr. Beavers and he said, "Well, I got this money" and they told him, "Well, you don't need to give it to Lamar, Archer, and Cofrin, they've been paid enough," and so that was his excuse in the deposition why he didn't pay us, so that's another version of why he didn't pay us.

Q So at no time prior to June of 2006, which was three months after the settlement of the entire Hartwell Enterprises/Appling lawsuit against Harrington Enterprises, Norga, Sunbelt, at no time did he ever tell you that he had the check and/or also that he wasn't going to pay Lamar, Archer, and Cofrin out of those proceeds?

A Absolutely not, he never told us that.

Q Okay.

A Told me that.

Q And was it your understanding throughout the representation, up to the dismissal of the underlying suit in **[76]** March of 2006, that he still had not received the tax refund check?

A Correct. I was getting -- beginning to get curious at that point in time why it was taking so long, but it had been a November meeting. He said he had had to redo it, and so I just assumed he hadn't gotten it yet.

Q Okay.

A And I say, our role, at that point in time, the litigation had wound way down.

Q Okay. Now at some point in time, after this lawsuit, or this adversary proceeding began, and discovery was exchanged in this proceeding, did Lamar, Archer, and Cofrin receive an amended US Individual Income Tax Return for the year of 2000, which is Exhibit Number 9 and I have just handed to you?

A Yes, we did. I think it was that -- well, I can't remember exactly, but it was the first denial of any existence of this tax return, and then ultimately I think it was at a -- it was at Mr. Appling's deposition that I was given this, or he may have gotten it from Mr. Strickland's deposition, but it was gotten at a deposition, we received a 1040X Amended US Individual Tax Return for Scott and Connie Appling for tax year 2002.

Q Okay. And what is the amount, first of all, that is being requested as a tax refund on this amended return?

A Well, the -- the -- [77]

Q On the first filing?

A Right. The return was dated June 15, 2005, and the amount requested was $60,718.

Q And so this -- that's Mr. Appling's signature, as best you know, and it's dated June 15, 2005?

A Well, it represents on the form this is -- Mr. and Mrs. Appling's signatures are authentic.

Q And his wife's signature?

A Correct.

Q And that was some three months after the March meeting when he pledged -- when he had advised you what as to the tax refund?

A Well, he represented at the March meeting that the return had already been prepared, was ready for filing, and that he was going to get well over 100 -- get over $100,000.

Q Okay. And can you explain to the Court, based upon these documents produced in discovery, what the IRS's response was to this June request, and what subsequent actions Mr. Appling took?

A Well, the IRS rejected this request, from our discovery, and requests that a revised request be filed, which was filed, I think, in August and said that he should be getting a refund within a few weeks. The IRS reacted to that, approved it, and changed the amount slightly, and I think it was $59,000 ultimately, and reported that he should be receiving a check in [78] a few weeks.

Q Okay. Now can you tell the Court what representations that were made at the March meeting that you believed were not -- were not true or were false?

A Well, based about what we've learned, first of all, I think it's -- it was -- and I didn't know this until the bankruptcy filings in this case, he represented at the meeting that he had absolutely no assets whatsoever to pay our legal fees other than his tax refund, and now it appears he had an IRA, according to the filings in this Court, with several hundred thousand dollars in it at that point in time which could have been utilized, albeit with penalties, but it could have been utilized, but he represented he had

absolutely no assets other than the tax refund, so that's one.

Secondly, he represented that he had a tax return already prepared that was going to show a refund of over $100,000, and as we learned through discovery it apparently was not prepared and it was also not for that amount.

Q And then at the November meeting, can you tell the Court what misrepresentations or representations that were not true were made by Mr. Appling?

A Well, first of all, if I had known either of those two things I just said on the March meeting we would have withdrawn at that point in time.

But going onto the November meeting, he represented **[79]** that he had not yet gotten the refund, and that he still expected to get an amount sufficient to cover all our fees and taxes, and that we should proceed with the Beavers' case, and that -- based upon that misrepresentation, which we now know he -- he says now he had gotten it and spent it, based upon that misrepresentation we continued to represent him and did not pursue immediate collection efforts, which I might state, it appears from looking the financial records that we got, and I will shed a little light on this, (indiscernible) my attorney hat on for a second, we sought a bunch of discovery of Hartwell Enterprises, Inc.'s financial records in this case, and were advised that all of them had been destroyed or taken over by the bank, they weren't in Mr. Appling's or his lawyer's possession, so -- but getting back to -- it appears that at that meeting he had not spent all of the money

that their -- the records show there was substantial capital contributions made by him after that meeting, so whether he had had it or not was -- he definitely had it, according to his testimony, at that -- by the time of that meeting. He represents now he had spent it by that meeting, but the records seem to reflect otherwise. But I didn't know any of that so I didn't rely upon any of those -- what we now believe were incorrect statements at the meeting. But if I had known that he had gotten the money and spent it at that meeting, we would have withdrawn and not worked to further consummate the settlement. **[80]**

Q And is it fair to say that his -- Lamar, Archer, and Cofrin wasn't relying upon a representation from or payment from future income from the business, but rather from the tax refund specifically?

A Correct. Mr. Appling was always complaining about what bad shape the business was in, he was always undercapitalized. There was no expectation of payment from the business. He was barely, according to him, barely keeping the doors open, and so we were looking solely and, again, because that was the only asset he had supposedly, we were looking solely at his tax return.

MR. DAVENPORT: Your Honor, I'd move for the admission of Plaintiff's Exhibits 4 and 9.

THE COURT: Any objection?

MR. WILDER: No, your Honor.

THE COURT: Which is Plaintiff's 4?

MR. DAVENPORT: That's the July 19 letter from Scott Appling to -- to Bob Lamar of Lamar's recovery.

THE COURT: Okay. Plaintiff's 4 and Plaintiff's 9 are admitted.

(Plaintiff's Exhibits Numbers 4 and 9 were received in evidence)

BY MR. DAVENPORT:

Q Now at some point did Lamar, Archer, and Cofrin decide to file suit against Mr. Appling individually to recover the [81] unpaid fees that they had not been paid?

A We did for the first time in our 32 years as a firm, we filed a lawsuit to collect fees, and this is the case.

Q Okay. And what was the result of that lawsuit?

A There were Cross Motions for Summary Judgment, and the Court entered judgment on behalf of Lamar, Archer, and Cofrin on October 31st, 2012 in the amount of $104,179.60.

Q Okay. And I have handed you a document labeled Exhibit 6, which is titled "Order and Judgment."

Is that the Order and the Judgment that was entered in the underlying case?

A It is.

MR. DAVENPORT: I would move for admission.

MR. WILDER: No objection, your Honor.

THE COURT: P-6 is admitted.

(Plaintiff's Exhibit Number 6 was received in evidence)

(Pause)

MR. DAVENPORT: I have no further questions at this time.

THE COURT: All right. Mr. Wilder?

MR. WILDER: Thank you, your Honor.

CROSS EXAMINATION

BY MR. WILDER:

Q Mr. Lamar, how long have you been practicing law?

A Since 1976. **[82]**

Q Okay. And after you took the case in June 2004 you, I guess, associated Walter Gordon?

A Yes, we did. We thought it important to have local counsel for just, A, for filings and dealings with the Court in Hart County, as well as a potential jury selection going forward.

And we also knew we were going to be going remediate ex parte relief as well as temporary preliminary injunction relief, and that -- well, that we were on a short time fuse and we needed local counsel to make filings with the Court, set up schedules, et cetera.

Q So you were pretty much in constant contact with him throughout the case?

A I was not. I've talked to Walter about working together with us, and then David Davenport took over the day-to-day contact.

Q Okay. So your firm was, your firm has knowledge of that?

A I don't know what you mean by "constant." We were in frequent contact.

Q Okay. Okay. Do you remember that the business was purchased, I guess, June 4th 2004?

A If you say so, I'm not familiar with it.

Q And Mr. Appling came to you less than a month later to get the -- get the deal rescinded.

A He came to me -- I met with him on July 3rd was our first **[83]** meeting.

Q Okay. So pretty much right after the deal he came to you to try to get it rescinded would be an accurate statement?

A We tried to get -- well, we weren't -- our first goal was not to get it rescinded; our first goal was to have -- to be able to get him to stop making payments because he represented he was going to go in default on the end of the month of July, and if we didn't get that stopped he was going to lose his house, he was going to lose his mother's house, the business was going to go under, and so the first -- the first goal was not to -- ultimate victory, but to stop the bleeding and stop the eminent foreclosures that he represented were going to occur.

Q So before -- I'll present to you a document I have marked as Defendant's 3. Can you tell me what that is?

A It appears to be the Complaint that was filed in Hart -- Franklin County Superior Court, I'm sorry.

Q Okay. Paragraph 1, Introduction, can you read the first sentence?

A I'm sorry?

Q Can you read the first sentence of Paragraph 1 under the Introduction?

A "The Plaintiff seeks to rescind his purchase of Defendant's businesses on the grounds that the purchase was induced by false representations and/or on grounds of mistake." **[84]**

There's no dispute here that was the ultimate goal was to get it done. I'm just saying on -- in July of 2005 the -- or was it '04? 2004, the goal was to avoid having to make a payment on July 27th or 28th. Then we were going to move to rescind the --

Q Okay. And this is the suit that you prepared, or your office prepared?

A Correct.

Q Now I will represent to you and look through the suit and make sure you're okay with it, it appears to me that Hartwell Enterprises and Mr. Appling were having cash flow problems and problems paying and problems with this business from the very start, would that be an accurate representation?

A That's what he represented to us.

Q Okay. And after you did that verified Complaint --

MR. WILDER: Well, Judge, we'll go ahead and move to admit D-3.

THE COURT: Any objection?

MR. DAVENPORT: No objection, your Honor.

MR. WILDER: Okay.

THE COURT: Admitted, D-3.

(Defendant's Exhibit Number 3 was received in evidence)

BY MR. WILDER:

Q Now after you took, I guess, Mr. Appling's word for it in the verified Complaint you did some work on it, I would expect **[85]** and do you know Mike Strickland?

A I have never met Mr. Strickland. I know -- I've heard of him, I've never met him.

Q Okay. Do you know what his role was in the case?

A I believe he was Mr. Appling's first, you know, CPA for the business and personally at that -- at that point in time that we were dealing with it.

Q You mentioned a letter I have marked as D-4. Now if the letter from Mr. Davenport --

THE COURT: I can't pick you up, Mr. Wilder, use the mic, okay?

MR. WILDER: Sorry, your Honor. I'll get better at it.

THE COURT: Okay. Thank you.

BY MR. WILDER:

Q This appears to be a letter from Mr. Davenport to your -- or to Mr. Malcolm who represented one of the Defendants, I suppose.

The middle of that letter says that "Mike Strickland has advised that the business is operating at a loss." So this accountant, as of September 2004, had let -- your firm, at least, knew that the business was operating as a loss?

A I have never seen this letter before, I'm not copied on it, I have no knowledge of it.

Q Okay. This letter appears to be on your firm letterhead? **[86]**

A Sir, there's a lot of letters that go out on my firm letterhead that I don't see or have any knowledge of.

Q Do you recognize Mr. Davenport's signature?

A It appears to be David Davenport's signature.

Q Okay. Would you agree with me, even without this letter, that your firm knew that the business, Hartwell Enterprises, was not cash flow positive?

A I can't -- again, I'm not -- was not on the front lines, I was not examining financial records of Hartwell Enterprises. I have no knowledge as to what, on a day-to-day basis, Hartwell Enterprises' financial status was, cash flow or otherwise.

Q Okay. I have handed up to you -- I handed to you a document attached -- or that I've labeled D-5, and this appears to be financial statements of Hartwell Enterprises that were given to your firm.

Do you know if your firm received financial statements of Hartwell Enterprises from Mike Strickland?

A I believe we did receive some. Some there's -- I don't know whether we ever received this one or not.

Q Okay. Wasn't it part of the case that the Defendant had to get financial statements of Hartwell Enterprises each month for a while?

A Yes, sir. I was not privy to -- I did not attend the TRO hearing, I did not review the discovery, Mr. Davenport and Mr. Gordon were handling all of that, so I don't -- **[87]**

Q You did not attend the TRO hearing they were on?

A I did not. We did not need three lawyers at a TRO hearing. Mr. Davenport and Mr. Gordon were there.

Q Do you know who Mr. Porter is?

A Yes. William Porter, I do, yes.

Q Okay. Did you know that he completed a financial report for your firm in this case?

A In which case?

Q In the suit against -- Hartwell Enterprises' suit that you handled for Mr. Appling.

THE COURT: Mr. Wilder, let me ask you to rephrase. I think I know what you're asking, but you said he prepared a financial statement for the Lamar firm. I think you meant he --

MR. WILDER: Yes, I'll correct that, your Honor.

THE COURT: Okay. Yeah.

BY MR. WILDER:

Q Mr. Lamar, were you aware that your office solicited and was provided a mediation report/financial statement from Mr. Porter regarding the business that Mr. Appling was running?

A I am aware, generally, that we retained Mr. Porter on Mr. Appling's behalf to do an analysis of his -- of the Hartwell Enterprise business at the time of his acquisition by Mr. Appling back in, I guess, whenever that was, June or May of 2004, yes. **[88]**

Q Have you seen the report?

A No.

Q Okay, so you never saw the report?

A No.

Q Okay.

A I mean, I may have seen it -- the cover of it, but to go through it and read it and analyze it, no, I never did.

Q Okay. If I -- if I let you know that Mr. Porter had determined the business was worth somewhere between 270,000 and 630,000, would that be consistent with your knowledge of that case?

A At -- probably not. What -- at what period of time? And I understood Mr. Porter was in a business of evaluation for -- in a definite period of time, not just an ongoing rolling business evaluation.

Q As of the date of purchase, which you mentioned as of June the 4th, 2004?

A I have seen that in Mr. Appling's letter that somebody did a business evaluation. It says in here somewhere that he -- it was 253 --

MR. DAVENPORT: Your Honor, I would object. If he wants to question Mr. Lamar about this "report," then he should provide him with a copy of it so that Mr. Lamar can review it and determine whether it's even -- it's already been labeled as prepared for mediation, whether it's certified or not, what the **[89]** purpose for it was.

THE COURT: Well, he's already testified that he doesn't remember seeing it, Mr. Wilder. Now if you want to show it to him and see if it refreshes his recollection, that's fine, but he's testified he doesn't remember seeing it, so proceed.

The objection is sustained.

BY MR. WILDER:

Q Mr. Lamar, I have marked this report as D-5, I think.

Do you recall seeing this?

A Just give me one second, please, let me look through it and see if there's anything. **(Witness reading document)**

No, I do not.

Q Okay.

A I mean, I think I may have seen the cover page.

Q Who is this addressed to?

THE COURT: Hold on. Do we have a problem?

(Court/Clerk confer)

THE COURT: No, this is D-5. This is the same D-5 financial statement of Hartwell that you were referring to earlier, correct? Do we already have a D-5?

MR. WILDER: Here's what I have.

(Counsel/Clerk confer)

THE COURT: Mr. Wilder, during lunch, this case was filed in June of 2013, during lunch I expect you to mark all of **[90]** your exhibits and have them ready so we're not marking them as they are presented, okay?

MR. WILDER: Yes, your Honor.

BY MR. WILDER:

Q Okay, Mr. Lamar, you said you were not aware, you do not remember this report?

THE COURT: Is this D-6 now?

MR. WILDER: This is D-6, yes, sir.

THE COURT: Okay.

THE WITNESS: I do not -- I know Mr. Porter was preparing a business valuation report, and I may have seen the front page of this just sitting on a conference room table or something, but I am not familiar with its contents.

BY MR. WILDER:

Q Okay. And are you aware, during the case, that Mr. Porter determined that the valuation of the business was much less than Mr. Appling paid?

A I believe I was generally aware of that, yes.

Q Is that a "yes," you were aware of that?

A Yes.

Q Okay. Mr. Lamar, I'm showing you a packet, this is going be labeled D-7, these are invoices from your firm.

Does that appear to be what they are?

A It appears so.

Q Okay. You would -- **[91]**

A Some of them are -- there are copies that are cut and pasted, it looks like. I mean, for example, there's an invoice LB-440 that looks like it's been cutted and pasted.

Q And you would have time records on these?

A These were generated from time records from attorneys at Lamar, Archer, and Cofrin, correct.

Q From your office? Okay.

A But let me say that I -- you know, this is a stack of documents a half an inch thick. I have not gone through and verified that these are the exact time records that we submitted to the Court in Franklin -- in Hart County that became the object of the judgment in this case -- in that case, but they generally appear to be time or billing records of Lamar, Archer, and Cofrin.

Q Okay. And I guess what I want you to do, follow with me, it looks like there are, and this is my premise, and tell me if you think I'm correct without going through these, there are a ton of time records in here that say "Discussion of company financials," "Discussion of company financials," "Three months of company financials," "Lots of review of company financials," and I am looking at time records on

09/17/04, 09/20/04, 09/27/04, 10/01/04, 10/13, 10/04, 10/19, 11/08, and then there's "Review of valuation" on 11/17; "Discussion of financials on 11/29," there's a whole bunch of places where "company evaluation" was discussed and reviewed by attorneys at **[92]** your firm.

A Do you have a question?

Q Is that consistent with your recall of the case?

A Again, if you're look -- look for example -- I mean, obviously, yes, I'm not saying any time record entries, I have knowledge of what these time records reflect or work that was done at the time.

I will acknowledge it generally involved, and as an issue in the case I was aware of the financial condition of Hartwell Enterprises, Inc. at the time it was purchased from Mr. Davis was the major issue in the case, and the subject of the rescission action.

Q And --

A For example, though, you asked me about these -- what I know about these time records. The September 17, 2004 time record, you pointed out, typifies my role in the case. I have three entries in the time record. Both of them are conferences regarding tax return issues and strategy, a conference with Mr. Gordon regarding hearing strategy. That's the type thing I was involved in, not the day-to-day.

Q And now you are here as a representative of the firm, I guess. And my question is, your firm had pretty intimate knowledge of the company's financials throughout this case, ongoing financials?

A We had a pretty -- I had, I think, pretty intimate **[93]** knowledge of the conditions of the business when he bought it, and to some extent, as for a period of time we got financials on the -- I believe on the business's operations, but again I wasn't privy to reviewing those. Mr. Davenport may have been.

Q Okay. Okay. But if the time records say it, you know, billed for it, pretty much you did it, is that a fair statement?

A If the time records say we did something, then -- and these are the time records, then that's what we did.

Q Okay. Going to March 2005, okay, you talked about what you did. Now this meeting was at Mr. Gordon's office, is that right?

A Correct, in his conference room.

Q Okay. So it was you and Mr. Gordon and Mr. Appling?

A Correct.

Q Okay. Anybody else, do you remember?

A Not that I remember.

Q Okay. Did you make any notes from that meeting?

A No, not that -- well, not that I have. I don't know if I did or not.

Q No notes. Did you send a letter after the meeting that says, "Mr. Appling, you agreed to give -- pay the tax refund over?" Did he sign off on it or something like that?

A Not that I remember.

Q Okay. Did you contact the IRS about a tax refund, try to **[94]** seek an assignment of it?

A No

Q All right. Did you --

A I trusted Mr. Appling.

Q I'm sorry?

A I simply trusted my client, Mr. Appling.

Q Okay. Did you contact -- now you said that you thought the tax refund document had already been submitted, the tax refund -- or return?

A No. I don't think he represented it was submitted. It had already been prepared, he had seen it and it was ready to -- ready to be filed.

Q Okay. So your testimony is that it was prepared, but not submitted?

A Well, correct.

Q Did you --

A That was my understanding from the conversation. I definitely know he said it had been prepared and he represented, you know, it was ready to be filed.

Q Okay. So did you contact Mr. Strickland about the preparation of it?

A No.

Q Did you know Mr. Strickland was preparing it?

A I assumed -- well, I had no idea who his CPA was. I heard Mr. Strickland. I assumed he was

somebody -- a CPA -- he said **[95]** his CPA had prepared it already and was ready to file.

* * *

[98]

* * *

Q Well, this case -- you have pled -- it looks like the total billed on this invoice was 189,496.73. Is that roughly what you think was billed to Mr. Appling's case?

Now I just -- I represent to you that I have just added up these invoices that are actual Invoice LB numbers and not finance charge numbers.

A If you represent it and that's what the math shows, that's what it shows. I can't verify it one way or the other.

Q Does 189,000 sound somewhat right?

A It was well over $100,000 I know that. It was well -- you know, it's --

Q And this invoice reflects total payments of $135,892.47, does that sound about right?

And I'll represent to you I've just added up the payments here that are listed.

A All I know is the balance is in the -- was in the -- without finance charges was, I think it was $60-some thousand.

Q Okay, so it's roughly consistent with the balance? So it's not like Mr. Appling paid you nothing for the case?

A No, he did pay a substantial amount of money.

Q Okay, now, I want you to split the time --

A And got a substantial benefit.

* * *

[121]

* * *

THE COURT: All right. Well, as -- and you don't need to respond, Mr. Davenport.

I'm going to deny the motion for this reason. Number one, the evidence is, is that the debt grew from 60,000 some odd dollars to $104,000. Yes, there were payments, but there's no evidence that those payments were made on those specific invoices.

Usually payments are applied to the oldest invoice, so there was -- there's no evidence there was an agreement that, from that point on, Mr. Appling was going to pay on a go-forward basis. [122]

So I don't accept your argument that there was no additional credit extended.

Also, the evidence that I have so far -- I'm not concluding this -- but based on what I've heard -- you may be able to contradict it -- but the evidence is, is that Mr. Appling made a representation that he had a completed tax return that he had seen and that his accountant had advised him that he was going to get a tax return of a hundred thousand dollars.

I also have evidence that, subsequently, an amended tax return asking for only $59,000 was actually filed.

So, so far -- and Mr. Appling may be able to deny this and contradict it, I have evidence in front of me to support the claim that Mr. Appling made a false representation about the tax return -- or the tax refund. And based on that, the Lamar firm continued to represent him. There's no requirement that you document representation or reliance.

There's no question that they knew that Mr. Appling and his company were having financial problems, but the law is unless you are on notice that something that is being represented to you is false -- i.e., the example the Supreme Court has given is I represent to you I am selling you a horse that is completed healthy, and I show you the horse, and you can see that the horse is blind, then you cannot rely on the representation that the horse is healthy. If you don't show me **[123]** the horse, I can rely on that representation.

So right now, I have no information that would suggest that the Lamar firm was in any way aware of any information that would suggest that Mr. Appling was lying about, one, the amount of the refund; or, two, the status of whether it was completed or not.

And so, as it stands right now, they have stated a case. They have made an initial showing -- they have made a prima facie case to support their claim.

So the motion to dismiss is denied, and you may now begin with your defense.

* * *

[126]

* * *

THE COURT: Okay. So how -- answer my question. How [127] does Mr. Appling's satisfaction and understanding of what was going to be provided him in the form of legal services and whether they met that -- his understanding, how does that in any way relate to the issue of what he told them at the November -- excuse me -- the March meeting and whether it was false or not?

MR. WILDER: Because when he told them that, he believed he was going to get the hundred thousand. We know that it changed --

THE COURT: Okay. That's fine. But whether he believed it or not has nothing to do with whether they completed the task that he expected them to complete.

MR. WILDER: It does in the sense that he also believed at the time they were talking about it that the completion of the task would result in lots of cash in his pocket.

THE COURT: No, that's not the -- that is not the claim here.

The claim is that he represented to them he was going to get a refund. There's not a -- there's not a representation here that he thought he was going to get money from some other source. The representation that's being alleged as being false is that he was going to get a hundred thousand refund.

Now, you can put your evidence on --

MR. WILDER: Right. [128]

THE COURT: -- and I'll listen to it as far as we go, but if -- I'm telling you if I don't see the relevance and if an objection is made, I'll sustain the objection unless I hear something that I'm not understanding. Okay?

* * *

[140]

* * *

Q Okay. Did you all have a billing agreement right up front?

A Well, before I signed their billing agreement, I asked him -- I explained to all them again I didn't have any money, and I said -- I said, "How much is this going to cost?"

And Bob Lamar said, "It could cost as much as" -- he said, quote, "It could cost as much as a hundred thousand dollars."

So when I read his agreement, I saw that, you know, there's no -- there's no -- you know, there's nothing guaranteed, blah, blah, blah. You might -- you know, you -- you know, we can't predict the outcome, but I took him at his word that, you know, it's only going to cost a hundred thousand dollars.

Like he said, he took me at his word. Well, I took him at his word.

Q Okay. So you --

A So I sat there for about five minutes, and I'm thinking to myself, "Where am I going to come up with a hundred thousand dollars?" I didn't have any money.

And so I didn't have any liquid cash. They referred to my retirement account. I didn't have any liquid cash. So I knew I had perfect credit -- **[141]**

Q Okay. So they worked for you for --

A I had perfect credit, so I knew I had --

THE COURT: Hold on. Hold on. Mr. Appling, now, Mr. Wilder is going to ask you a question --

THE WITNESS: Okay.

THE COURT: -- and you answer that question only. And then he'll ask you another one --

THE WITNESS: All right.

THE COURT: -- okay? All right. Mr. Wilder.

BY MR. WILDER:

Q Okay. So they worked for you for July '04, and they sent you -- it looks like the first bill in D-7 -- I believe you've got that up there --

A It was $50,000 -- 55,000.

Q Fifty thousand. And you paid that?

A I paid it the next day.

Q Okay. And then --

A I borrowed the credit -- I wrote a credit card check -- first of all, I had to write them a retainer when I signed the contract. I gave them a $10,000 retainer.

Q Okay. And then --

A I went home and cashed a credit card check to cover it.

Q Okay. So --

A Then they directed me to go meet with Mr. Gordon --

Q So then -- **[142]**

A -- wrote him --

Q -- in August --

A -- wrote him a $10,000 check --

THE COURT: Hold on. Mr. Appling, answer the question that he asked, and then he'll ask you another one. Okay?

MR. WILDER: And --

THE COURT: This is not your turn to just talk, and talk, and talk.

THE WITNESS: Yes, sir.

THE COURT: He asked you a question. You answered the question. Okay.

MR. WILDER: Okay.

BY MR. WILDER:

Q In August 2004, they attended a Temporary Restraining Order Hearing for you; is that right?

A Correct.

Q Okay. And then they sent you another bill in looks like September of 2004, for another --

A Fifty --

Q -- 55,308.84?

A Correct.

Q You paid that?

A I -- it took me to the end of the year to pay that, because I was already out of money. **[143]**

Q Okay.

A I had cashed -- I had $70,000 worth of checks, credit card checks -- with the two retainers to the both attorney firms and that first invoice, I was -- I was out of money.

Q Okay. Now, did you --

A So it took me a little bit of -- it took me a little bit of time to come up with the money to pay them, and I paid them in December of -- on that next $50,000 bill.

Q Did you believe that the -- that all of the legal fees, or pretty much all of them, had occurred by then?

A Well, here's what I thought. When I got the first bill, there was a letter from Bob Lamar explaining that they had -- as he stated on the stand -- that they had to jump through all these hoops to make these deadlines, to keep these people from taking action against me, and the reality is they were in second and third position on the mortgage.

Let's ask the jury -- I mean the Court what repercussion did they have at -- what could they have done to me? Could they have taken the business back? Yeah, they could have bought out the bank for $750,000 to take the business back --

THE COURT: All right.

MR. WILDER: Okay.

THE COURT: There's no question that that's responsive to. Okay? **[144]**

THE WITNESS: Okay. So --

THE COURT: Ask a question, Mr. Wilder.

MR. WILDER: Thank you, your Honor.

BY MR. WILDER:

Q Okay. And you also hired Mr. Gordon as local --

A Well, no. They hired --

Q -- counsel and got bills from him?

A -- Mr. Gordon.

Q Do what now?

A They hired Mr. Gordon.

Q Okay. You were paying Mr. Gordon. You paid him --

A I was paying Mr. Gordon.

Q Okay. Now, you had a meeting with them in -- at the TRO hearing time, at the temporary restraining order time?

A Yes.

Q Okay. And what was the substance of that meeting?

A Well, they froze the payments. And during that court, the CPA comes in with revised tax returns.

Q Okay.

A And at that point, the whole thing should have been thrown out of the court.

Q Were they -- were you and your business providing financials to --

A Yes, at that meeting --

Q -- Lamar -- **[145]**

A -- the judge wanted to make sure I wasn't pulling a scam, and he ordered that I provide monthly financials to the court and to the Defendants every month to prove that I did have the wherewithal to make their payments.

And I did that every month, including bank statements, all the way up until June -- until April or May -- until John Davis and I's agreement was signed in May of 2005.

Q Now, from your understanding, litigation primarily went from July 2004 to May 2005?

A Yes. June -- it went mainly -- trickled into June and July.

Q Now, I'm going to hand you a document I believe may have already been identified as Defendant's 5.

THE COURT: That was previously described as financials of Hartwell business.

THE WITNESS: And can I address the financials, your Honor?

THE COURT: If he asks you a question --

MR. WILDER: (Indiscernible).

THE COURT: -- you can.

THE WITNESS: Oh, okay.

MR. WILDER: Okay.

BY MR. WILDER:

Q This is a document that's previously been identified as Defendant's 5. **[146]**

A Correct.

Q Tell me what that is.

A This is a financial -- a monthly financial that Mike Strickland prepared. He was now my permanent accountant.

Q Okay. So he prepared this and this was sent to you. Where did it go afterwards?

A This was sent -- well, actually, it was sent to me, and sometimes it was sent to me and copied David Davenport, or I provided them to Mr. Gordon, and Mr. Gordon would look and them, and charge me to look at them, and then forward them on to Atlanta.

Q And so these type of statements were provided every month by --

A Every month --

Q -- you?

A -- and the bill -- their bills show -- are rife with review financials, review financials -- we can go over every page --

Q So your --

A -- in the billing showing that they reviewed my financials.

Q Your testimony is that if we went through the bills, that every line that says -- that says in their bills "review financials" --

A Exactly. [147]

Q -- this is what we're talking about?

A Exactly.

Q Is that right?

A All the way up until the end of the case.

Q Okay.

MR. WILDER: Judge, we'd move to admit D-5.

THE COURT: Mr. Davenport?

MR. DAVENPORT: No objection.

THE COURT: Admitted. D-5 is admitted.

(Defendant's Exhibit Number 5 was received in evidence)

* * *

[151]

* * *

BY MR. WILDER:

Q The business -- I'm taking it the business was not profitable at this point?

A No, sir. Well, you know, what I ended up finding out was -- which was kind of going with the story in the beginning -- was that he -- the owner, he escalated a contract, ran it through the business real fast instead of -- instead of sparsing it out and making sure his employees had work every week, which is what they normally did, and could sustain through the summer months and had business -- he escalated that contract and ran through that

production, which Mr. Reed couldn't understand what he was doing.

So when I came in, that contract was over with, and I had five employees with no revenue. I mean, I had two other customers --

MR. DAVENPORT: Your Honor, I'm going to object again. There's already testimony that the business was in dire straits. That's why the suit was brought and why there was a settlement with substantial savings.

This is not relevant to the issue before --

THE WITNESS: Yes, it does --

MR. DAVENPORT: -- the Court. **[152]**

THE WITNESS: It is relevant.

THE COURT: Mr. Wilder -- Mr. Appling, you're not arguing the legal points. Okay?

THE WITNESS: Okay.

THE COURT: When an objection is made --

THE WITNESS: Sorry, sir.

THE COURT: -- your lawyer argues. You --

THE WITNESS: All right.

THE COURT: You be quiet. Mr. Wilder --

MR. WILDER: I --

THE COURT: -- what's your response? Haven't I already ruled that all of this stuff is irrelevant?

MR. WILDER: Well, we're assessing the credibility of all of this stuff. I do agree with Mr. Davenport that we've had evidence on this, so I'm prepared to move on.

THE COURT: All right.

MR. WILDER: All right.

THE COURT: Move on.

BY MR. WILDER:

Q Okay. The March 18, 2005 meeting, you had some discussions with Mr. Strickland, I take it --

A Yes --

Q -- about tax returns.

A Yes. When I got --

Q Tell me about -- **[153]**

A When I --

Q -- those.

A Yes. When I got the letter from Bob Lamar pressuring the financial side of what I owed them --

Q This was the March 2005 letter that's already been admitted?

A Yes.

Q Okay.

A You know, I knew what that meeting was going to be going into Gordon's office, and I called Mike, and I said, "Mike, they're pressuring me to come up with some money," and I've -- you know, we've already cut my salary. My salary was supposed to

be 75,000 a year. There's not one year I got that. And the last two years, I didn't even have an income.

And so he said, "Well, let me think about this for a minute." And he said, "Well, you know, you've got these losses."

And I said, "Okay."

He said, "The IRS provides you with the ability to go back three years if you had -- if you had paid any taxes, to recoup your losses by going back and -- against those taxes you paid." And so he said, "What were your earning is 2002 and 2003?"

And I -- this was on the phone. This was a phone call conversation. And I said, "Well, you know, you know, my **[154]** last year, in 2002, I made $295,000." I said, "That's not including Connie's salary. That's just mine alone."

And he said, "Well, assuming a 28 percent tax rate, you would have paid over a hundred thousand dollars in taxes just on that year alone." And he asked me what I made in 2003. So he did a quick pencil on a calculator and came up with, you know, "Scott, you could -- you know, we can maybe get you as much as a hundred thousand dollars."

Q Okay.

A Now, I've heard three testimonies in this court --

Q Now, is that what you knew at the time --

A At -- at -- at --

Q -- of the year --

A At the time.

Q At the time of the meeting --

A And we'd already done my -- we'd already done my 2004 tax returns, so he was going to amend it, and go back, and carry those losses back.

Q So at the time of the meeting, you had not done through that --

A No, I had not --

Q He hadn't --

A -- done it. And at the time of that meeting, I didn't make a promise, because I couldn't promise what I didn't know I was going to get. It hadn't been done yet. **[155]**

There's three different testimonies that's going on with these tax returns and not a single lawyer got it right, but the closest one was Walter Gordon's explanation of it that the Judge didn't hear.

Q What --

A He was the only one that's --

Q Tell us what your explanation of --

A My explanation --

Q -- it is.

A -- is he carried -- he carried it back, he called me when it was ready, I went to his office in September, we -- I mean in June, we signed the paperwork, and he mailed it off.

Now, he could -- he could do -- he couldn't file it electronically, because it -- the IRS doesn't provide you to file amended tax returns electronically, so we had to mail them.

All right. So in my meeting, here they are telling me they're going to back out of my case two weeks before the pretrial hearing, or just days before the pretrial hearing.

Q Okay. What --

A And I had already paid these guys over a hundred thousand dollars. And I paid Walter Gordon thousands of dollars. I paid the accountant thousands of dollars. And I paid my other accountant thousands of dollars.

And so I'm sitting here thinking -- you know, okay, **[156]** so I guess I'll mention this tax return coming. And I said, "Look, Mike Strickland is working on amending a tax return," and that's exactly how Mr. Gordon termed it, "amended tax return." He was right. And he was also right that it hadn't been filed yet.

And so here comes June. I go down there and sign it, and it's -- June 15th, to be exact, and it wasn't a hundred thousand dollars. It was 60. And I said, "You know, what's wrong with this?"

He said, "Well, I did -- carried back calculations, and according to the IRS, this is what it's going to be."

And so I mailed -- he mailed it off, and I waited about three weeks -- it only takes about three weeks to get a check -- in four weeks to get a check from the IRS. I waited three, or four, or five weeks, and I didn't hear anything.

I called him up. He didn't hear anything.

So I called the IRS myself. Now, they want to say I was mad at my CPA, and that's not -- and

Mr. Davenport tried to bring that up in my deposition with Strickland, that I was mad at him. I wasn't mad at Strickland. It just -- it -- the IRS never received it. Mike said, "I mailed it." He said, "I'll mail it again."

I said, "Mike, I'm coming to your office right now." I drove from Franklin Springs, Georgia, an hour and fifteen minutes to his office, I got those tax returns, and I put them [157] in the mail myself to the IRS.

Now, I called the IRS when I found out it hadn't been mailed, and the woman who helped me told me to send them directly to her, which I did. They --

Q So as of the meeting time, the tax return had not been prepared?

A No, they had not been prepared.

Q And you did not make a promise to pay a hundred thousand over --

A No, I did not make a promise. And I'll tell you --

Q Were there --

A I'll tell you why -- the last thing they asked me, "Now, you're going to pay us with that money?"

I looked at both of them and I said, "Providing that it's what it's supposed to be. If he gets me a hundred, I'll be able to pay you," because already I owed them -- I owed them both almost a hundred thousand dollars.

* * *

[163]

* * *

BY MR. WILDER:

Q Mr. Appling, do these notes make any mention of any income tax -- offer, issue, or anything?

A No, sir.

Q Were you attempting to write down every issue that you talked about during the meeting?

A Yes, sir. Because we were --

MR. DAVENPORT: Your Honor, I'm going to object to the leading --

THE WITNESS: We were --

THE COURT: Whoa, whoa, whoa --

MR. DAVENPORT: -- aspect of that question.

THE COURT: An objection has been made. Stop talking, Mr. Appling.

What's the objection?

MR. DAVENPORT: Leading the witness.

THE COURT: I think that's a proper objection. Sustained. Why don't you rephrase?

MR. WILDER: Okay.

BY MR. WILDER:

Q Mr. Appling, tell me about these notes. What did you make notes about? [164]

A I made notes about what was coming up on the trial calendar: the May 1 deposition due; May 14th,

Linnet (phonetic) testimony; and June 14th, final pretrial.

To go on further -- and a comment about the final pretrial, Mr. Lamar wanted to -- stated that there was no way I was going to win this case, because of my lack of due diligence. Through the letter, he spelled out before the meeting -- stated I was in -- I was in -- it wasn't -- the case wasn't represented as how I represented it to them, and that -- in other words, he kind of alluded to the fact there was going to be no trial.

Well, here's my notes right here, pretrial, June 14th, so we --

Q Okay. Tell me --

A -- discussed those dates, and then I said, "How much is it going to -- how much" -- we're discussing this bill and the bills I owe them, I said, "How much is the trial going to cost me?"

And Bob says, "50,000 through the trial," and I got cap -- so he was in a -- I was going to have to spend another 50 to get to trial after I'd been told that the case, had it been front-end loaded in the beginning, in the first month of the preparation of the TRO, that they were ready for trial in August of 2004, David Davenport told me, and my wife, and my mother that they had front-end loaded the case, and that they **[165]** were ready for trial in August of 2004.

So I'm looking at another $50,000 bill, and then Walter wanted $10,000 deferred after trial, which I think was my -- I believe that was my retainer he was referring to.

Q Okay. So after --

A And -- and -- but he was -- but he was not going to cap it. There was going to be no cap.

Q So after this March meeting, I guess -- it never got to trial. You had some other meeting, in what time?

A Well, right after this meeting, I get a phone call from David Davenport, and it states that he's going to have to amend the case, because the judge ordered us to rework the deal, and I started screaming. I mean, I was livid.

And I said, "What do you mean, amend the case?"

He said, "The judge has kind of indicated that rescission is not possible."

THE COURT: He -- what was not possible? I'm sorry.

THE WITNESS: Rescission.

THE COURT: Rescission. Okay.

THE WITNESS: And I was livid. I don't -- here, I'd spent a hundred and -- well, so far, I mean, I was -- after -- and after that -- by the way, you -- as you touched on, after that meeting, I paid Lamar, Archer $25,000. I paid Walter Gordon, as he testified, 17,150, and I paid another 8,000 -- almost $10,000 to the expert witness, Mr. Porter. **[166]**

So it -- here I was, trying to commit fraud, but yet I was paying 40, $50,000 out to all these people.

BY MR. WILDER:

Q Okay. So the case was eventually settled?

A Well, I got the phone call and he says, you know, "I'm going to amend the case and I'm going -- I'm going to be in trial and I'm going to let Walter Gordon handle the negotiations with John Davis."

And so Walter took over the case, and it went back and forth for weeks, and weeks, and weeks -- back and forth, back and forth, back and forth, and I had laid out my -- my offer was --

THE COURT: Okay. Stop.

THE WITNESS: We knew what the --

THE COURT: Stop. Mr. Appling, the question was the case was eventually settled. The answer is either --

THE WITNESS: Yes.

THE COURT: -- yes or no. Okay.

MR. WILDER: Okay.

THE COURT: Now --

THE WITNESS: Yes.

THE COURT: -- if Mr. Wilder wants to ask another question --

THE WITNESS: Yes, the case was settled.

THE COURT: Okay. Answer the question that **[167]** Mr. Wilder asks you. Okay. Mr. Wilder.

MR. WILDER: Okay.

BY MR. WILDER:

Q When did the case settle? What month?

A It settled -- John's contract was signed on May 13th --

Q Okay.

A -- I believe. I provided a $38,000 check. That was no partial payment. That was the first -- that was not --

Q That --

A That --

Q That was the check that was identified earlier in the exhibit --

A That was the check that was identified earlier. That was the first installment of his quarterly payments on the $100,000 note.

Q So as far as you knew, the case was settled in May of 2005?

A The -- John -- the main case was settled in 2005. I've got my signed agreement on my desk -- on the desk over there with my signature and their signatures with a date of May 2005.

Q Okay. And you've already talked about your tax return you got back in -- what month was is you say that you finally got it back?

A I got it back in -- well, first of all, it came back in error. **[168]**

Q All right. Well, when you finally --

A The CPA --

Q -- got the money--

A The CPA --

Q -- when was that?

A -- had to redo it and send it back. The lady who I was working with sent me a letter in October -- what was it, the 26th or something is the date of the letter -- stating that they had finalized my tax return. It's on its way.

Q Okay.

A And it was for --

Q So --

A -- $59,000.

Q -- what did you do when you get the tax refund money back?

A I immediately called Bob Lamar.

Q Okay. And what did you tell him? What was the idea?

A I told him I wanted to meet him, and I sent him --

Q Okay.

A -- an agenda, and I told him I wanted to talk about our bill, and I wanted to talk about pursuing the Beavers case, as they promised.

Q Okay. When was that meeting?

A That meeting was the 1st of November.

Q Okay. And where was that at?

A In their office. **[169]**

Q Okay.

A And my wife and I were present.

Q Okay. So what did you -- what was the result of that meeting?

A It didn't go very well.

Q Okay. Well, what happened?

A I asked how much I owed --

Q Okay.

A -- and he brought a printout. And I asked Mr. Lamar if he would be interested in bringing the bill down.

Q Okay.

A And he didn't even flinch. He said, "We're not going to reduce it a dollar."

Q Okay.

A And I said -- and, you know, which, frankly, didn't surprise me. And then I said, "Well, when will you start the Beavers case?"

And the whole time, they had been -- they -- in the -- in our -- during our TRO meeting, Mr. Davenport stated that the -- when I asked him about the status of the Beavers case, he said the Beavers was a slam dunk. A CPA malpractice case was a slam dunk.

And I asked him about my legal fees, because I'd already paid the $50,000 on the first bill. And he told me then that I would get all my legal fees back from the first **[170]** case from the CPA malpractice case.

Presently in that meeting was my mother and my wife.

Q And that was the November 2005 meeting, so --

A No, that was the -- that was during the TRO.

Q So that was --

A That we were going to get our money back from the Beavers case, so when I went down in November, we said, "Would you take the Beavers case on?"

Bob Lamar said, "Well, no, I wouldn't be -- we wouldn't be interested in doing that."

And I said -- well, I said, "Why not?"

He said, "Well, on a contingency case, we'd have to spend another $30,000." He quoted a figure of $30,000. He said, "On top of your 55 that you owe us, you would be into us for $85,000."

He looked at my wife and I said -- "And that simply would be a bad investment for our law firm."

My wife looked at him and said, "What about the slam dunk CPA lawsuit that we've been hearing about for months?"

And even to the point that once Mr. Davenport got that insurance letter from Malcolm -- Jeffrey Malcolm showing that he had a million dollar policy, Mr. Davenport said that I would be able to get probably about a half a million dollars off those two policies.

Q Okay. [171]

A So what -- we were very interested in getting the CPA case started to recoup what he said was going to be our legal fees. And when he said, "Well, Ms. Appling, that -- there's no such thing as a slam dunk case," and he said, "And our firm is not willing to take the risk for $85,000." And --

Q So where did the money go, if you didn't pay Lamar, Archer?

A Well, I -- I looked -- I looked at her and she looked at me, and then, you know, we're basically at the end of the meeting, and he says, "Did you get your income tax return?"

Now, they -- they're sitting here denying that I said anything about my tax return. He asked me point blank did I get my income tax return.

Q This is in November 2005?

A In November 2005, which is the reason why I called the meeting. I looked at Mr. Lamar, and by this time I was very angry. The slam dunk case wasn't slam dunk any more. He wasn't willing to reduce the bill one dollar. Not one dollar.

I got stuck with the business. I got no money back. In the negotiations with John Davis, I asked for 250 to $350,000 back of the money I gave him because we had an expert witness testify that the business was only worth at the most 630. I had no working capital. I had no money. It's been -- it's already been --

THE COURT: Mr. Appling, Mr. Appling, the question **[172]** was what did you do with the $59,000.

THE WITNESS: I looked at Bob Lamar and I said, "Well, if I pay you this money, I go out of business. I didn't get what I thought I was going to get. If I pay you, I'm out of business this winter."

So if I keep the money, I'll at least have a chance at making what I got stuck with. And I looked at him and I said, "So I guess I think you know what my decision is going to be."

And my wife and I stood up and we walked out.

* * *

[176]

* * *

THE COURT: Okay. All right. We will conclude at this time.

Now, Mr. Wilder, I need you to work with Mr. Appling about the rules about testimony. I know Mr. Appling has a lot emotionally invested in this case, and I don't want to discount that in any way, but the trial will go much, much smoother if we can confine our answers to the question asked, and you develop your direct testimony a little bit better so he's comfortable that he doesn't have to just dump his brain out every time you ask him one question. He needs to be comforted that you will eventually get to the things that you all have determined will be important.

So I ask you to work with Mr. Appling.

You know, being a witness is not an expert thing, Mr. Appling, and I don't mean to criticize you in any way. It's just that we have to control this or we'll never get through. So work with your attorney about that.

MR. APPLING: Yes, sir.

* * *

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA

LAMAR, ARCHER & COFRIN, LLP, Plaintiff, vs. R. SCOTT APPLING, Defendant.	CASE NO: 13-03042 ADVERSARY Macon, Georgia Tuesday, September 23, 2014 (1:35 p.m. to 4:39 p.m.)

MAIN CASE: 13-30083
R. SCOTT APPLING AND CONNIE F. APPLING

TRIAL PROCEEDINGS

BEFORE THE HONORABLE JAMES P. SMITH,
UNITED STATES BANKRUPTCY JUDGE

* * *

[13]

* * *

BY MR. WILDER:

Q Okay. So let's follow the tax return before we return to the meeting.

Subsequent to you talking to Mr. Strickland -- and I believe you testified subsequent to the March meeting this tax return was amended for 2002; is that right?

A After the meeting.

Q Okay. So after you talked with Mr. Strickland and after the March 18th, 2005 meeting the

amended tax return was completed by Mr. Strickland.

A Approximately June 15th.

Q Okay. I call your attention to Plaintiff's Exhibit 9. Do you have that in front of you?

A The tax return?

Q The amended tax return.

A Yeah. Yes, sir.

Q Okay. Now, this is the tax return that you completed; is that correct?

A Correct.

Q Okay. And this was -- it looks like it was rejected by the IRS and then later it's submitted. I want to call your attention to the letter on the back. Can you explain to me what that is?

A Well, the -- **[14]**

Q The last page of this Exhibit 9.

A Yes, this is a letter -- this is the one that I had contacted when I didn't get anything in the mail after a few weeks and found out that she never received -- that they never received the first filing of the amended tax return. So I drove to Mike Strickland's office and picked up a copy and delivered it myself. And then it was kicked out, rejected. He had to make an adjustment. And she sent me a letter notifying me that it was being processed, that was decreased again and that I should have it in a couple of weeks. And the date of that letter is -- I think it was October 6.

Q Okay.

A 2005.

Q And you eventually got back less than you were expecting --

A Yes.

Q -- on the tax return?

A Yes, sir.

Q And how much did you get?

A I got 59,000.

Q Okay. And you were expecting a hundred?

A Well, I knew when we -- I knew in June when I signed it, it wasn't going to be a hundred, June 15th.

Q Okay.

A And Mike told me that the carry back formula just **[15]** didn't -- the formula that they used to prepare it just didn't pick up all -- every bit of my tax.

Q Okay.

* * *

[31]

Q Did you all talk about the tax refund at that meeting?

A Well, I first said -- that was the last thing we discussed. I first said to him, I said, "Well, wouldn't it be reasonable to assume that if you won that case, the slam dunk case, and I got this money back that I'd be able to pay you my bill?" And he told me that he'd rather write the debt off than gamble on $85,000.

Q Okay.

A So I looked at my wife and she looked at me and he said, "Did you get your tax return?" And we thought it would be pretty obvious that I got my tax return since I'm sitting here trying to negotiate to pay the bill.

I said to him, I said, "Bob," I said, "I, too, have to make a business decision" and that if I paid him the money I owed him, that I'd be out of business the next day and that I would rather take that money and try to keep the doors open on the business I was stuck with.

Q Your testimony is that you told Mr. Lamar in November 2005 that you had gotten your tax return money back.

A Absolutely. Without a doubt.

* * *

[40]

* * *

CROSS EXAMINATION

BY MR. DAVENPORT:

Q Now, Mr. Appling, you've testified about the March meeting and about your conversation with Mr. Strickland.

You never -- you're not today denying your testimony **[41]** from last week that you represented to Mr. Lamar and Mr. Gordon that you were getting in excess of $100,000 in a tax refund are you?

A I didn't testify to that last week. I didn't testify that I was going to get a hundred back. I testified

that Mr. Strickland said that I could possibly get a hundred back, and that's what I told Mr. Gordon and Mr. Lamar that I don't know what I'm getting back, there's a potential I get 100,000; if I get 100,000 I should be able to pay your bill. That was the last statement I made to them at the meeting's end. They asked me so you can pay this bill with this tax money. I said providing I get $100,000 back I can pay your bill.

Q You never told them you hadn't prepared the tax -- the amended tax return did you?

A It hadn't been prepared.

Q You didn't tell them that either did you at that March meeting?

A No. I said I just had a meeting with Mike Strickland and he's going to try to do an amended tax return. Mr. Gordon's testimony was dead on that I said that I had to do a carry back provision, and he even stated himself that he didn't know that I had, in fact, had prepared that yet.

Q That's because you didn't tell them you hadn't prepared it, correct?

A I didn't say I had. **[42]**

Q And you told them that you were going to get a tax return. We can agree on that, didn't you?

A Well, I wasn't -- that's exactly right. I can agree on I said I would get something back.

Q And you told them it was going to be in excess of $100,000 didn't you?

A I said that Mike Strickland said that it could be potentially $100,000.

Q You didn't tell them Mike Strickland said that. You told them --

A Yes, I did.

Q -- you were getting the tax return --

A No, sir, I did not.

Q -- didn't you?

THE COURT: Hold on. All right, all right. Mr. Appling, let Mr. Davenport finish his question and then you can answer.

THE WITNESS: Yes, sir.

THE COURT: Mr. Davenport, let him finish his answer before you ask another question. I can't pick up two people talking --

THE WITNESS: Yes, sir.

THE COURT: -- at one time on the record, okay?

THE WITNESS: Sorry.

* * *

[45]

BY MR. DAVENPORT:

Q Now, just going back to Defendant's 18, which is the 2002 W-2 --

A Yes, sir.

Q -- form that has now been introduced in evidence. You never produced this in discovery. In fact, you never provided this document to Plaintiff, Lamar, Archer & Cofrin until today; isn't that true?

A Nobody asked for it. That's true.

Q Well, we'll see about that. And on the form itself look at -- under federal income tax withheld, that line -- down under your name, the second box.

How much money in taxes did you actually pay in 2002?

A Well, just on this -- this W-2?

Q Yes.

A It was $64,000.

THE COURT: How much?

THE WITNESS: Sixty-four thousand four hundred and one dollars.

MR. DAVENPORT: Okay.

THE WITNESS: That's just on this W-2.

BY MR. DAVENPORT:

Q But that was -- you only amended 2002 tax return.

A No, it was carried back for three years and we went back and got money for 2002 and 2003. **[46]**

Q How much did you pay in two thousand --

A And my wife's income wasn't included in this -- on this page right here. My wife's W-2 was included for 2002. Her W-2 is included in the calculation for 2003, and my 2003 W-2 was included in that.

Q How much did you --

A But this obviously was the bulk of the money.

Q Did you bring your 2003 W-2 with you today?

A No, I don't have those.

Q How much did you pay in 2003?

A I don't know. She made about 40, 45; I made 18.

Q You made 18.

A Yes, sir.

Q So out of your salary how much of that 18,000 did you pay in federal income tax?

A I don't know.

Q Did you pay any?

A Oh, I'm sure I did.

Q Out of your 18,000.

A Well, we filed a joint return.

Q Mr. Appling, you understand that you were --

A We filed a joint return. That was total income of about 58,000 for the year, maybe 60,000.

Q You understand that your loss carry back resulted from the business -- **[47]**

A Correct.

Q -- that you had purchased, correct?

A Correct.

Q And that that loss carry back only went back to your tax return.

A No, it goes back to the joint return. It's a -- the return is a personal return. Business income carries back on a personal return.

Q Isn't it true that you only paid $64,000 in 2002 and that's why the maximum amount --

A No, sir, my wife paid --

Q -- you could have gotten back was 64,000 --

A No, sir.

Q -- or less?

A No, sir. My wife paid taxes, too.

Q Well, look at your amended return.

* * *

[68]

* * *

REDIRECT EXAMINATION

BY MR. WILDER:

Q Okay. I've just got a few pointed questions, and we'll move this along somewhat. Now, Mr. Appling, in March, 2005, who came up with the $100,000 figure for the tax refund?

A Mr. Strickland.

Q Okay. So, you didn't create the figure other than giving some inputs.

A No, sir.

Q Okay. Now, you said earlier -- there was some talk about you complaining about billing. Do you have Plaintiff's Exhibit 2 in front of you?

A Yes.

Q Okay. I believe you've identified this before, but there is an e-mail attached to that exhibit?

A Yes, sir.

Q In that e-mail -- do you complain about billing in any way in that e-mail?

A Yes, sir. I sure did.

Q Was that -- to the best of your knowledge, was that the first writing you complained about billing practices? **[69]**

A The first writing, yes. Yes, sir.

Q Okay. Should I take that to mean you complained over the telephone before, or is this pretty much the first time?

A Well, yeah, it was -- well, I wouldn't say it was exactly a complaint, but when I received the first bill for 50,000 for the three weeks for the work, I received a phone call from Mr. Davenport, and he asked me if I received the bill. And, of course, Lamar's letter was attached to that bill, you know, explaining why the bill was so much, that they had to pool all the resources together; you know, they had a limited amount of time; you know, kind of alluding to the fact that, you know, we did all this work, you know, we jumped through the hoops, and kind of alluding that that's why the bill was so much. And then I received a call from David Davenport and he asked me if I received a bill, and I said, Yes, I did. I said -- he said, I want to make sure you don't have sticker shock. And I said, Well, I do have sticker shock, David. And I said, I don't -- I told you, you know, how much money I had, and the -- the day I signed this contract, that I only had, like, $70,000 in credit card checks that I could obtain, and now I'm down -- you know, I've given -- I've paid out

$20,000 in retainers and now $50,000 for a bill; my money's gone.

Q When did that occur? Was that after that first billing?

A That was when the first bill hit, when I got -- received the first bill. **[70]**

Q Okay. And you got another bill for 50 grand after that, I guess?

A The next month.

* * *

[74]

* * *

BY MR. DAVENPORT:

Q Are you disputing Walter Gordon's billing statement that he reviewed the settlement agreement as signed on January 17th, 2006?

A Yes, I am. I never saw that bill.

Q And you don't --

THE COURT: That's not the question.

THE WITNESS: Yes, I -- I just --

THE COURT: The question is the -- **[75]**

THE WITNESS: I do -- I do dispute --

THE COURT: Listen, Mr. -- Mr. Appling. Mr. Appling, the question is the entry on the time bill says that the settlement agreement was reviewed on a specific date. Do you dispute that that's what happened?

THE WITNESS: Okay. I have no knowledge of that happening.

THE COURT: Okay.

MR. DAVENPORT: That's all I have, your Honor.

THE COURT: All right. Okay. Well --

MR. WILDER: Nothing further.

THE COURT: Okay. I'm going to admit D16 and D19.

(Defendant's Exhibits 16 and 19 were received in evidence)

* * *

[79]

* * *

THE COURT: Okay. I got you. All right. Now, the letter that's attached at the very end of this document, which is dated October 6th, 2005, says you're going to get a refund of $59,851 within the next two weeks.

THE WITNESS: Correct.

THE COURT: Did you, in fact, get the refund within two weeks?

THE WITNESS: Yes, sir.

THE COURT: Okay. All right. **[80]**

THE WITNESS: That's why I called a meeting.

THE COURT: All right. So, at the time of the November, 2005, meeting, you had the refund --

THE WITNESS: Yes, sir.

THE COURT: -- in hand.

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: That's why I called the meeting.

THE COURT: All right. Did you tell Mr. Lamar at that meeting that you had received that check in that amount?

THE WITNESS: Yes, sir. He -- well, he -- he asked -- the last question he asked me --

THE COURT: Yes.

THE WITNESS: -- was did I receive the tax return.

THE COURT: Did you tell him no?

THE WITNESS: I told him I did.

THE COURT: Okay. Did you tell him --

THE WITNESS: And that it wasn't -- that it wasn't --

THE COURT: -- the amount?

THE WITNESS: That -- I told him -- well, I told him it wasn't what I expected to get.

THE COURT: Did you tell him how much it was?

THE WITNESS: I don't really recall whether I did or not.

* * *

[86]

* * *

Q And you didn't know about this -- this settlement offer was first presented at the April, 2005, meeting --

MR. DAVENPORT: Your Honor --

MR. WILDER: -- so far as you know?

THE COURT: -- same objection. We've been through this.

THE WITNESS: That's the first we heard of it.

THE COURT: Wait, wait, Ms. Appling.

MR. DAVENPORT: We've been through this. It's not relevant to what was said at the March meeting and/or the November meeting, which was --

THE COURT: How is it relevant?

MR. WILDER: Judge, it's relevant to credibility. The March --

THE COURT: Whose credibility? Whose credibility?

MR. WILDER: Well --

THE COURT: There's no question that the lawyers had one attitude about the case; it's spelled out clearly in the March, 2005, letter; Mr. Davenport had a different idea. There [87] is no question that these parties were diametrically opposed in the way that they viewed the case. Okay? Now, that doesn't speak to their credibility.

MR. WILDER: Well, what I'm trying to show is that Mr. Appling at the March, 2005, meeting had no knowledge of this other -- other way of settling his case.

THE COURT: What does that matter? The question is: Did he tell them that he had -- he expected a tax return of $100,000? Did he know that was false? At that time, did he tell them that the tax return was completed? Nothing that happened after that had an impact on what he knew at the March meeting. Okay? That's the issue in the case. What did he say and what did he know?

MR. WILDER: Well, one of the issues that's raised in the case law on these type of cases is did something change afterwards, after the hearing? Did something diametrically change?

THE COURT: No, sir. No, sir. If you lie today --

MR. WILDER: Well, I understand now.

THE COURT: -- the fact that something changes in the future does not make your lie today a truth.

MR. WILDER: Well, I understand that --

THE COURT: So, if --

MR. WILDER: -- and that's not where the case law is at. **[88]**

THE COURT: If he made a misrepresentation, if he told him, Look, I got $100,000 refund, my accountant has shown me the return, it's ready to go, it's prepared, which is what Mr. Lamar has testified, if I believe that, then your

client loses, okay, because it doesn't matter what happened after that, because at that point he has told a lie. Okay? That's -- that's -- that's false representation if he said, I got the refund, I know it's there, and the return is filed -- I mean the return is prepared. Now, he testified that the refund was just approximate and it wasn't completed yet. I've got to decide which of those I believe, okay? But what happened after that has nothing to do with what happened at that meeting.

MR. WILDER: Well, your Honor, I think they were trying to say that the promise was renewed in November in some way.

THE COURT: In November. That's right. If at the November meeting he reiterated those promises and he knew that they were untrue, then he's committed another false representation.

MR. WILDER: Well, let's talk about November. I'll talk about November with the witness, your Honor --

THE COURT: Okay.

MR. WILDER: -- if that's okay. **[89]**

BY MR. WILDER:

Q Ms. Appling, were you in attendance at the November meeting?

A I was, yes.

Q Okay. Did you make notes of that meeting?

A I did.

Q When did you make those notes?

A During the meeting and the two-hour drive home.

Q Okay. So, these were made at or near the time of the meeting?

A Yes.

Q Okay.

(Pause; voices and whispers off the record)

MR. WILDER: Do we have the original notes?

THE WITNESS: No.

MR. WILDER: Okay.

THE WITNESS: Thank you.

BY MR. WILDER:

Q I'm showing you a document that I marked as Defendant's 10. Do you recognize that document?

A I do.

Q Okay. What is it?

A This is the meeting that Scott called and made an appointment to go down in November to talk about the billing because they were not doing any work on the case at all. And **[90]** we were at a standstill; we didn't know what was going on. Scott called for a meeting, and we drove two hours to Atlanta.

Q Okay. So, this meeting was in Atlanta in Mr. Lamar's office?

A Yes, sir.

Q Okay. And you actually personally wrote out these notes?

A I did.

Q Okay. You don't have the original of them.

A No, but Scott filed all -- all kinds of files and all kinds of bills.

Q Okay.

A We came across this digging through all of the boxes and all of the bills.

Q So, are you confident that this is the -- this is an accurate copy of what you wrote?

A Absolutely.

Q Is this in your handwriting?

A It is.

MR. WILDER: Okay. Your Honor, we'd move to admit Defendant's 10.

THE COURT: Mr. Davenport?

MR. DAVENPORT: No objection, your Honor.

THE COURT: Admitted.

(Defendant's Exhibit Number 10 was received in evidence) [91]

BY MR. WILDER:

Q Okay. Do these notes, Ms. Appling, reflect the information about a tax refund?

A The tax refund was mentioned at the very end of the meeting before we left after Bob Lamar said that he would not work with us on the bill at all and

that he was not going to pursue the George Beavers case that he told us he was going to get us money back for. Right at the end of the meeting he asked Scott if he had his tax return.

Q Okay. And what was said, to the best of your knowledge?

A Scott said, Yes, I did get it.

Q Okay.

A And he said it was not anything like we thought it was going to be, like our CPA, Strickland, said it was going to be.

Q Do you remember if Mr. Lamar was told by Scott the amount of the refund?

A No. Scott did not know the amount of the refund. He called Strickland, the CPA, and said, you know, This is what's going on, I need more money, and Strickland did a calculation over the phone and told him how much it was going to be. When he got it, it was not what -- what Strickland had told us it was going to be.

Q Okay. So, in November, 2005, did Scott have the refund?

A Yes, sir.

Q And did you know how much it was? **[92]**

A Yes, I knew how much it was.

Q Did Scott tell Lamar how much it was in November, 2005?

A No.

Q Did -- what did he tell him as far as the number?

A Scott was begging Bob Lamar to continue, because he had told us that he could get us money back. And that is why we were meeting with him, to try to find out if, in fact, he was going to be able to get money back from the CPA with -- for us and when that case was going to be filed. We couldn't understand why they didn't file it already.

Q And you know what the money was used for from the tax refund?

A Yes, sir.

Q Okay. What was it used for?

A It was to support the business and to support our family. We had creditors calling already. All our credit card bills were piling up, and his business was failing.

Q Okay.

A And he made the only business decision he could make.

Q And did that keep the business afloat for a while?

A Yes, sir, it did.

MR. WILDER: Your Honor, that's all of the questions I have for this witness.

THE COURT: All right. Mr. Davenport, cross? **[93]**

CROSS EXAMINATION

BY MR. DAVENPORT:

Q So, you're -- you don't have the original of this document, correct?

A No. It was a copy that was in the files. Scott had boxes and boxes of bills, and we came across it when we were looking at all of the billing.

Q And you just found this a couple of months ago?

A It was in with all of the bills.

Q Just a couple --

A Yes, sir.

Q -- couple of months ago, correct?

A It was in with all of the bills. Yes.

Q And your testimony --

A We knew we had a meeting, but when we found these notes, then we said, Okay, this is when we went down to beg them to continue the case.

Q And when -- and, so, your testimony is that you prepared a portion of this subsequent to the meeting on the ride back to Hartwell? Is that your testimony?

A We had questions already written down that we needed to ask you and Bob Lamar, because you were in the meeting also, in the conference room. We had already written down questions, specific things that we needed to find out. So, yes, we had already written some things out. This was on the two-hour ride **[94]** home because we were in total shock of what you said, that you would not spend one more dollar -- Bob Lamar, and with you sitting there, said you would not spend one more dollar of your firm's resources on our case. And Scott and I could not believe it. We walked out of that meeting and we were totally dumbfounded. For the whole two hours home I wrote, and this is what I ended up writing.

He put it in the file. We never thought that we would be here 10 years later. And, David, you know. You told us you would get us money back. You never did that.

THE COURT: Okay. Ms. Appling. Ms. Appling, let's don't ramble. Just answer the question that's asked, okay?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. DAVENPORT:

Q And, so, just so we're clear, these were prepared on a car ride back to Hartwell by you.

A Yes, sir.

Q Now, and you are testifying that Scott, without disclosing the amount of the tax refund, told Bob Lamar that he already had the check?

A He said the tax refund has been done. Yes.

Q And --

THE COURT: That's not the question, ma'am. The question was: Did he tell him he had the check? Not whether **[95]** the refund had been done, but did he have the check?

THE WITNESS: (indiscernible)

BY MR. DAVENPORT:

Q Did Scott tell Bob Lamar and myself that he had the check in hand?

A I believe so, yeah.

Q You believe so? Or you --

A Yes, he did.

Q Okay.

A Yes, he had the check. That's why we called the meeting.

Q And what was Mr. Lamar's reaction when he heard that?

A Scott asked him first if he was going to continue the case. He told us he was going to go after George Beavers to get us money back. So, the tax return was only discussed right at the end. So, I don't understand your question.

Q The question is when -- your testimony is that Scott said that he had the tax refund and he wasn't going to pay Lamar, Archer and Cofrin.

A He did not say that.

Q Okay.

A No, sir. He did not say that.

Q What did he say?

A He said, I have to make a business decision either to keep my business afloat or go bankrupt. That's what he said. He never said he was not going to pay him. He said, I have to **[96]** make a business decision, just like you, Bob Lamar. I have to decide if I'm going to keep my business going and try to keep a roof over my family's house, my family -- that's the decision I have to make. He did not say, I'm not going to pay you.

MR. DAVENPORT: Thank you.

THE WITNESS: He said, I have to make a business decision.

MR. DAVENPORT: Thank you

* * *

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* * *

THE COURT: All right. Let me stop you there because that seems to me to be the lynchpin of this whole case. I have -- everybody agrees that the number $100,000 was discussed at that meeting. There's no dispute about that. Mr. Gordon -- and I listened to his testimony again yesterday. Mr. Gordon did not recall that Mr. Appling said that the tax return was prepared. That is consistent with Mr. Appling's testimony, and that version of facts would be consistent with Mr. Appling's testimony that he had simply gotten some preliminary **[103]** information from Mr. Strickland. And if -- if that is the version that I accept, then there has not been a false representation at that point; because at that point Mr. Appling is doing nothing more than saying what he believes. Now, he may have been mistaken; and, obviously, he was, because the tax return -- the refund was fifty-nine; it wasn't a hundred. But Mr. Gordon's testimony seems to be in line with Mr. Appling's. And if that is the version that I accept, then I must find that Mr. Appling simply was mistaken, and that is not a false representation. That's not a fraudulent representation. To be false and fraudulent it has to be knowingly wrong. So, if the accountant had told Mr. Appling, you know, Based on this information, I think you can get $100,000, then they sit down and put pencil to paper to -- pencil to paper, it turns out different, that's a different thing than if Mr. Davenport -- excuse me --

if Mr. Appling told Mr. Lamar and Mr. Gordon, The tax return is done, I have seen it, it's going to be $100,000. Now, that's Mr. Lamar's recollection. And if that is the version that I accept, then at that point I would find that Mr. Appling had made a misrepresentation, he had fraudulently made a false representation that he knew not to be true.

What is your suggestion on how I resolve that? Because, as I tell people all of the time, most people who get on this witness stand don't have horns and pitchforks so that I can tell who the angel and who the devil is. And if this is **[104]** nothing more than a disagreement as to recollection, how am I to resolve that conflicting testimony, when you have the burden? And that's -- that's the whole key here. You have the burden. You've got the -- you know, by a preponderance of the evidence, you've got to show me that the side that you're urging is more believable than the side that Mr. Appling is arguing. So, help me out with that. Where do I look?

MR. DAVENPORT: Well, I think there are two issues confined right there. One, I believe that -- that -- or I submit that Mr. Lamar's testimony, the statement that the return had been prepared, is sufficient. But even -- but Mr. Gordon stated that there was a representation made that there would be; there would be, not just speculative; not just, I think, I hope, I wish. Mr. Gordon was emphatic that the statement was, even if he was unsure that -- that Mr. Appling used the word that it had been prepared, there was no doubt in Mr. Gordon -- in his testimony that the representation was made that there would be a tax refund of 100,000 or more.

THE COURT: Okay. And how -- but -- okay.

MR. DAVENPORT: And the second --

THE COURT: But how is that -- how is that a false representation if -- you know, I have conversations with my accountant all of the time, and, you know, I say, Well, what about this, and he says, Well, it could be this or this or that, and I report that to somebody. Now, I'm accurately **[105]** reporting what I believe. I may be wrong. But that's not a false representation. So, if Mr. Appling had called his accountant and the accountant had said, Let me ask you some questions, and Mr. Appling had given him information, and the accountant said, Well, based on that, I think you can get a hundred thousand, and then he reports that to you all, how is that fraudulent? It may be incorrect. And subsequently it proved to be incorrect. But unless you can establish that Mr. Appling, when he said it -- I think it's going to be $100,000, he knew good and well it couldn't be that or wasn't that -- in other words, I don't have Mr. Strickland's testimony that said, You know, I never told Mr. Appling that; I told him it was going to be 20 or 30 thousand dollars, maybe we'll get 60. I don't have that. So, where do I find the evidence that Mr. Appling knowingly stated a falsehood?

MR. DAVENPORT: And I have a couple of points.

THE COURT: Okay.

MR. DAVENPORT: But to go back --

THE COURT: Well, that's why I'm asking you.

MR. DAVENPORT: He did not -- he did not state what you just described. He did not say, Well, I had a conversation with Mr. Strickland. That's not what Mr. Gordon testified; that's not what Mr. Lamar did. He said, I am going to receive a tax refund in the amount of. He represented that to be true without detail. He didn't say, Well, I had a conversation with **[106]** Mr. Strickland, I called him. He didn't say the tax return hadn't been prepared. He didn't say, Well, we're speculating. He didn't say, Well, I -- I gave Strickland my income and he did a rough calculation but he's uncertain; I think; I'm going to. That's not what the testimony was between either Mr. Gordon or Mr. Lamar. It was, I am going to receive.

And I think, on that same point, and then in Mr. Lamar's letter of June 26th, on page three, he states that, and I quote, that, in -- in response to the March 9 letter:

> "In a meeting we had with Walter Gordon, you represented to our firm and the Gordon law firm that you were entitled to a refund of taxes from the IRS which would be sufficient to cover all of our outstanding and anticipated invoices, and you promised to utilize that refund when received to pay our outstanding and future invoices."

And, then, Mr. -- so, there is a -- there is a letter sent in the ordinary course of business, and under Georgia law it creates a rebuttal -- rebuttable presumption.

THE COURT: Does that apply in federal court?

MR. DAVENPORT: Um, I -- I believe that the -- that would be a substantive law that -- that would as to the evidence. We submit that it would.

And then there is a response, a written response, in July to that very letter about that meeting. And in this **[107]** letter Mr. -- Mr. Appling does not deny that statement. In fact, he doesn't even address it. What he does say is that -- then he talks about the November meeting and even acknowledges for the first time in November -- in July of 2006 that, It should be obvious what I chose to -- to do with that check.

So, we submit that for a couple of reasons, the testimony from the stand was not maybe, kind of, could have, would have, should have. It was, I am getting a refund. Mr. Lamar remembers the statement being that the return had been prepared; Mr. Gordon did not remember one way or another. And -- and I don't think their testimony is inconsistent, and I think that's sufficient alone.

The second component would be was it a reasonable -- was it a reasonable statement; was it reasonable for him to believe at the time that that was true. And we submit that the evidence is that it was not. The evidence before the Court just introduced today with the W-2 is that -- that Mr. Appling paid 64,000 and change in 2002 in taxes. The amended tax return for 2002, the only year he filed subsequent to this discussion that he states that he had with Mr. Strickland --

THE COURT: Well, let me --

MR. DAVENPORT: -- also has 64,000.

THE COURT: Let me stop you there. Let me stop you there, Mr. Davenport --

MR. DAVENPORT: Yes. [108]

THE COURT: -- because this -- this is just -- this is the real human element in a case. You know, I can state categorically that if you asked me to remember how much I paid in taxes last year or the year before or the year before, I don't -- I don't know how much it was. Okay? So, is it really reasonable to argue that someone would have in their mind the amount of taxes they had paid in the last few years? I mean, do you know how much you paid last year or three years ago?

MR. DAVENPORT: The testimony from Mr. Appling just today was that after he received the March 9 letter he then called Mr. Strickland. He then pulled out his -- his returns. That's what his testimony was; and that within a week -- I think it was actually from March 9 to March maybe 18, then this meeting occurred. And during that short period, that time window, he specifically called his CPA, Mr. Strickland; he had looked at his tax returns; and -- and provided Mr. Strickland the specific information about what he -- how much he had made and what he had paid.

* * *

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* * *

MR. WILDER: Okay. We've got the November, 2005, notes. We do have the several pages of notes from Ms. Connie Appling that were

just introduced. And the Court's already indicated and mentioned that the testimony of Gordon and Lamar do not agree, about whether the tax return was completed or not completed in March. And there is no other evidence to support Lamar's versions of events. I asked him. Lamar said he made no notes, no inquiries, no billing indications, nothing. There is nothing anywhere close to the time from Lamar Archer or from Gordon that show that they made any such deal. There's not a letter following up that says, You just made the deal to pay me [119] your tax refund; you know, keep me -- keep me apprised of it; let me know everything about it. There's not an inquiry to the IRS; there's not an inquiry to Strickland; there's not even billing for it.

THE COURT: What -- you've made that point several times, know good and well, if you -- if a stranger writes the IRS a letter and asks something about a third party's return, they're going to get a letter back saying it's none of your business.

MR. WILDER: Well --

THE COURT: I mean, you're not getting anywhere with that, Mr. Wilder.

MR. WILDER: No. Not -- not with the IRS, but what I'm saying is nothing was done --

THE COURT: You said there was no letter from the IRS that --

MR. WILDER: There is no letter even to Mr. Appling from the firm that says, You just promised this; you know, I'm reminding you, you just promised this, so I have it in my file so I can come back to it if there's a problem.

THE COURT: All right. So --

MR. WILDER: There's not even paperwork.

THE COURT: So, are you saying that any time you have a meeting with a client you've got to write a -- a cover-your -- the-rear-end letter or be subject to saying it never **[120]** happened?

MR. WILDER: Well, I think that's why lawyers do that.

THE COURT: Well --

MR. WILDER: I mean, I'm not saying every time you have to do that, but I'm saying if you've got something important, like, This guy's 60 grand behind on his payments and we're going to get paid from the tax refund, we want to be real specific about that, especially if we're not withdrawing for this promise. I mean, I -- this would have been a letter I would have written, or at least a billing, something to show that this happened, because this was really important in the case, from what everybody's testified to.

THE COURT: Okay.

* * *

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* * *

MR. WILDER: So, he clearly had notice of that. He had notice of Strickland's value, Porter's value, all of the different valuations of the company. He even -- we found out on March 1st, 2005, he either did something relating to calling a bankruptcy attorney for Mr. Appling about his personal issues.

So, he knew -- I mean, he knew to be skeptical. I mean, he just threw that out the window and --

THE COURT: No.

MR. WILDER: -- relied on his client.

THE COURT: No, the question is -- the question is: Was it proper for him to rely on the representation that Mr. Appling made, which was, The return is done, it is ready to be filed, and I'm going to get over $100,000, and I will use that to pay my legal fees.

MR. WILDER: Okay. Well, let --

THE COURT: Well, why would -- knowing the company is in financial distress, why would that automatically make me think my client's a liar? That's what you're arguing to me, that he should have been no notice that Mr. Appling was telling him a falsehood.

* * *

No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Bankruptcy Code prohibits the discharge of "any debt . . . for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2). Three Circuits have held that a statement concerning a specific asset of the debtor cannot be a "statement respecting the debtor's . . . financial condition." Two Circuits, including the Eleventh Circuit below, have held that it can be. Based on that interpretation, the Eleventh Circuit here reversed the bankruptcy court's conclusion that the debt at issue "is nondischargeable," Pet. App. 14a, even though it is based on a fraudulent statement.

The question presented is whether (and, if so, when) a statement concerning a specific asset can be a "statement respecting the debtor's . . . financial condition" within Section 523(a)(2).

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OPINIONS BELOW

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JURISDICTION

The court of appeals entered judgment on February 15, 2017. Pet. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 523(a) of Title 11 of the United States Code provides, in relevant part, that:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive . . . .

INTRODUCTION

Respondent R. Scott Appling repeatedly lied to his attorneys about the status of a specific asset—a tax refund—he had promised to use to pay for their services. First, he lied to them about how large the refund would be and, later, he lied to them about the status of the refund. As a result of those lies, petitioner Lamar, Archer & Cofrin, LLP (Lamar) agreed to continue to represent Appling in an ongoing business dispute, notwithstanding his failure to make past due payments on his legal bills. Ultimately, Appling's lies allowed him to run up more than $100,000 in fees—which he never paid. All of that must be taken as a given here because it is based on factual findings, made following a trial below, that Appling has not challenged in this Court.

The question in this case is whether Appling is entitled to discharge that debt in bankruptcy, notwithstanding that he procured it through a fraud. For centuries—indeed, for practically as long as bankruptcy has existed—the law has distinguished between the "fraudulent debtor" and "honest but unfortunate debtor," and refused to relieve debts procured through fraud. Today, that longstanding prohibition is embodied in 11 U.S.C. § 523(a)(2). Section 523(a)(2)(A) prohibits the discharge of debts for money or services obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial

condition." This case focuses on the meaning and scope of the carve-out at the end—"other than a statement respecting . . . financial condition."

Congress adopted this so-called "financial statement exception"—and added a parallel provision in Section 523(a)(2)(B) imposing certain requirements for when a debt procured by way of a false financial statement made in *writing* is nondischargeable—as part of its overhaul of the bankruptcy laws in 1978. As this Court explained in *Field v. Mans*, the exception was adopted to address a specific practice engaged in by some creditors who elicited incomplete (and thus inaccurate) financial statements from debtors for the very purpose of insulating their own claims from discharge. 516 U.S. 59, 76-77 (1995).

In the decision below, the Eleventh Circuit acknowledged that "'[f]inancial condition'" in Section 523(a)(2)(A) refers to "one's *overall* financial status," and not to "any particular asset on its own." Pet. App. 7a-8a (emphasis added). And the court acknowledged that the only false statements at issue here concerned "a single asset"—Appling's tax return. *Id.* at 6a. The court concluded, however, that Congress's use of "respecting" unambiguously extended the financial statement exception to cover not only financial statements and other descriptions of one's overall financial status, but also any lie that "relates to" or "impacts" a debtor's "overall financial condition"—including statements about a *single* asset. *Id.* at 9a.

The text, context, and history of Section 523(a)(2)(A) all compel the rejection of that construction. "Respecting" does not always have the expansive, "related to" meaning that the Eleventh Circuit gave it here. It also means "about" or "with reference to." And that meaning—"about" or "with

reference to"—makes far more sense in the context of the sentence at issue and, indeed, is how this Court has previously understood the phrase. *See Field*, 516 U.S. at 76 (recognizing that Congress sought to address "lies *about* financial condition" (emphasis added)). The Eleventh Circuit's construction of "respecting," by contrast, negates the focus on overall financial health inherent in Congress's use of the term "financial condition," and causes the exception to take a huge bite out of the anti-discharge rule.

The Eleventh Circuit's construction of Section 523(a)(2)(A) also starkly departs from background principles of bankruptcy law. This Court has recognized repeatedly, in connection with this same provision, that it is "unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan v. Garner*, 498 U.S. 279, 287 (1991). Under the Eleventh Circuit's interpretation, however, debtors are free to lie to creditors' faces, and still earn a "fresh start," so long as their lies relate—in some way—to their finances. That rule would blow a hole through the longstanding rule that debts procured through fraud generally are *not* dischargeable. Yet there is no indication that Congress contemplated such a major shift in bankruptcy law. Not a peep. This Court therefore should be especially reluctant to adopt an interpretation that reaches that result.

The decision below should be reversed.

STATEMENT OF THE CASE

I. STATUTORY HISTORY

Congress enacted the statutory provision at issue, 11 U.S.C. § 523(a)(2), in 1978. As this Court has previously recognized, however, Section 523(a)(2) embodies a principle that is nearly as old as bankruptcy law itself: the "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan*, 498 U.S. at 287)). Because the "historical pedigree of the fraud exception," *id.* at 223, provides the backdrop for Congress's action in 1978, we begin by briefly recounting that history here.

1. Since the Founding, American bankruptcy law has always recognized that the salutary protections of bankruptcy should be reserved for "honest debtors." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1101 (1833). The line drawn "between the fraudulent and the honest bankrupt" traces its lineage back to the English bankruptcy laws from which Americans borrowed. *See* St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, Vol. 1, App. 259 (1803) (online 1987, Univ. of Chicago), http://press-pubs.uchicago.edu/founders/documents/a1_8_4_bankruptcys3.html ("It is, however, necessary to distinguish between the fraudulent and the honest bankrupt: the one should be treated with rigor; but the bankrupt, who, after a strict examination, has proved before proper judges, that either the fraud, or losses of others, or misfortunes unavoidable by

human prudence, have stripped him of his substance, ought to receive a very different treatment.").

This principle has remained a fixture throughout the entire evolution of bankruptcy law in the United States. During the debate on one of Congress's first attempts at a federal bankruptcy code in 1840, for example, then-Senator Martin Van Buren called "the distinction between fraud and misfortune the great point." *Life of Martin Van Buren* (June 13, 1840), *in Volumes of Speeches Delivered in Congress* 326 (Globe Office, 1840). "[I]mprisonment of the unfortunate debtor . . . ought everywhere to be regarded as an outrage," he observed. *Id.* But "[o]n a man imprisoned for [fraud]," he continued, "the community would look with feelings of indifference." *Id.*

Debtors are of course no longer imprisoned today, but Congress has always been wary of granting the privileges of bankruptcy to those who have secured debts through frauds. When it first allowed discharge of debts without creditor consent in 1867, Congress provided a "long list of dishonest or otherwise reprehensible acts" that would disqualify a debtor from any discharge whatsoever. Vern Countryman, *Bankruptcy and the Individual Debtor—A Modest Proposal to Return to the Seventeenth Century*, 32 Cath. U.L. Rev. 809, 815-16 (1983); *see also* 40th Cong., ch. 258, 15 Stat. 227, 228 (1868). And that principle, expressed in various forms, has been embodied in our bankruptcy laws ever since.

As the United States has advised this Court, "[t]he policy against discharging debts incurred by fraud is deeply embedded in the bankruptcy law, and has been recognized in every bankruptcy statute since the Act of March 2, 1867." *Grogan* U.S. Amicus Br. 13, 1990 WL 10022411; *see also* U.S. Amicus Br. 10, *Husky Int'l*

Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (2016), 2015 WL 9488262 ("Congress[] [has made a] policy determination that an individual who owes a debt for money or property obtained by fraud is not the type of honest but unfortunate debtor who is entitled to the benefits of the bankruptcy system. That determination reflects the broader understanding that equitable principles govern the exercise of bankruptcy jurisdiction, and that a creditor's right to recovery is paramount in the face of a debtor's dishonesty."); *Cohen*, 523 U.S. at 217; *Grogan*, 498 U.S. at 287; *Brown v. Felsen*, 442 U.S. 127, 128 (1979).

2. By the time Congress enacted the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (the predecessor to the modern Bankruptcy Code), it had begun to express the anti-fraud principle in language still used today. Section 17(2) of the 1898 Act, codified at 11 U.S.C. § 35 (1932), made discharge unavailable for "judgments in actions for fraud," or where property was obtained "by false pretenses or false representations." 30 Stat. at 550. A few years later, Congress amended Section 17 to provide that "liabilities for obtaining property by false pretenses or false representations" would be nondischargeable, thereby clarifying that debts arising from a debtor's dishonest conduct would be protected from discharge even if they had not been reduced to a judgment by the time the bankruptcy proceedings commenced. Pub. L. No. 57-62, 32 Stat. 797, 798 (1903).

At the same time, Congress amended a different portion of the Act, Section 14 (codified at 11 U.S.C. § 32), to provide that a debtor would not be entitled to discharge *at all*—for *any* debts, not just fraudulently obtained ones—if the debtor had "with intent to conceal his financial condition, destroyed, concealed,

or failed to keep books of account or records from which such condition might be ascertained," or "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining property on credit." 32 Stat. at 797-98. This wholesale prohibition on discharge applied on top of the more targeted prohibition in Section 17(2).

An unintended loophole in Section 14, however, led Congress, in 1926, to introduce the "statement respecting ... financial condition" language implicated in this case. By that time, it had become common for commercial credit agencies like R.G. Dun & Co. and the Bradstreet Company to obtain "statement[s] of assets and liabilities" from debtors, then either publish the statement itself or a credit rating based on that statement for the use of creditors who subscribed to the agencies' services. *J.W. Ould Co. v. Davis*, 246 F. 228, 229 (4th Cir. 1917). As a result, the question arose as to what happened when a creditor relied on that report—a statement that did not come directly from the debtor, but instead indirectly via the credit agency's publication. Was a debt procured as a result of such a statement nondischargeable because it was a product of fraud?

In several cases, debtors had made "false representations of solvency ... to commercial agencies," rather than directly to their creditors. *Id.* at 230. The debtors argued that because they had not given their false financial statement to the person from whom they actually obtained the credit, Section 14, by its terms, did not apply. Most courts agreed, holding that "the ordinary statement of financial condition made to a *mercantile agency* for general circulation among its inquiring subscribers would not

be within the statute," *In re Russell*, 176 F. 253, 258 (2d Cir. 1910) (emphasis added), and that creditors who had relied on the (misinformed) credit agencies rather than obtaining information from the borrower directly would therefore be unable to prevent discharge of the fraudulently obtained debt.

To close this loophole, a number of influential groups, including the American Bar Association and others, suggested amending the statute in 1925 to preclude discharge by any person who had "[o]btain[ed] money or property on credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing." *Revision of the Bankruptcy Law: Hearing on H.R. Res. 353 Before the H. Comm. on the Judiciary*, 68th Cong. 45 (1925) (statement of Joseph B. Jacobs, Member of Bankruptcy Committee of the Commercial Law League). That language was drafted "as broad as [its authors] could do it, in order to make it as effective" as possible. *Id.* at 47. The legislator who ultimately introduced the fix in the House was concerned to ensure that it "does not cover too much ground," *id.*, though, and the provision was eventually narrowed to apply only to a debtor who "ma[de] or publish[ed] or caus[ed] to be made or published . . . a materially false statement in writing *respecting his financial condition*," Pub. L. No. 75-696, § 14, 52 Stat. 840, 850 (1938) (emphasis added).

This is where the "statement . . . respecting . . . financial condition" language in the Bankruptcy Code appears to have originated. And, to be clear, it was added to protect creditors *against* the discharge of debts procured through fraud where a creditor relied upon a false financial statement prepared by a debtor

and (unintentionally) repeated by a credit agency as to the debtor's overall financial status.

3. Fixing one unanticipated problem led to another. Over time, the provision put in place to address a specific fraudulent practice by *debtors* (submission of false financial statements to credit reporting agencies in order to manufacture favorable credit ratings) gave rise to an unsavory practice by *creditors*. Some creditors began to threaten that they would bring forward financial statements that had only arguably been false, or as to which the debtor may have simply made an honest mistake, unless the debtor agreed to repay the debt to that particular creditor in full. And because of Section 14's rule that a debtor who had made a false financial statement in writing for the purpose of obtaining property on credit would be denied *all* discharge, debtors often agreed to the creditors' demands as to the individual debt even where they would very likely have prevailed had the issue been fully litigated. *Limiting the Use of False Financial Statements As A Bar To Discharge In Bankruptcy*, H.R. Rep. No. 86-1111, at 2 (1959).

By 1959, the House Committee on the Judiciary reported that the prospect of having all discharge denied if a false financial statement were brought to light had given "[a]n unscrupulous lender armed with a false financial statement . . . a powerful weapon with which to intimidate a debtor into entering an agreement in which the creditor agrees not to oppose the discharge in return for the debtor's agreement to pay the debt in full after discharge." *Id.* And, indeed, to take advantage of the blanket discharge rule, some creditors had "condoned, or even encouraged, the issuance of statements [by debtors] omitting debts," which they could later use to force the debtor into

agreeing to more favorable terms. *Id.* Congress therefore revised the statute "to eliminate as a ground for the *complete* denial of a discharge the obtaining of money or credit through false financial statements issued by a nonbusiness bankrupt," thus making Section 14's complete-discharge rule inapplicable to consumer debt. *Id.* at 1 (emphasis added).

The 1960 amendment, however, failed to eliminate this practice. As this Court recognized in *Field*, even without the blanket-discharge provision, consumer finance companies still sometimes found it advantageous to elicit incomplete financial statements "by their borrowers for the very purpose of insulating their own claims from discharge." 516 U.S. at 76-77. For that reason, a congressional Commission appointed to suggest changes to the bankruptcy laws recommended "that the false financial statement exception to discharge be eliminated for consumer debts." H.R. Rep. No. 95-595, at 131 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6092. Congress, however, declined to go that far, recognizing "that there are actual instances of consumer fraud, and that creditors should be protected from fraudulent debtors." *Id.* But it did decide to "balance the scales more fairly." *Id.*[1]

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[1] As this Court recognized in *Field*, the Committee charged with overseeing this revision described the problem as follows:

> It is a frequent practice for consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding. . . . The forms that the applicant fills out often have too little space for a complete list of debts. Frequently, a loan applicant is instructed by a loan officer to list only a few or only the most important of his debts. Then, at the bottom of the form, the phrase "I have

4. So, as part of the Bankruptcy Code of 1978, Congress separated the "false financial statement exception," *id.*, into a new subpart of the statute—codified at 11 U.S.C. § 523(a)(2)(B)—which addressed the use of written "statements respecting . . . financial condition." 11 U.S.C. § 523(a)(2)(B)(ii). The new provision moderated the rule against discharge in these circumstances by requiring a creditor to show that it had "reasonably relied" on the false financial statement and that the debtor had made the statement with "intent to deceive." *Id.* § 523(a)(2)(B)(iii)-(iv). At the same time, Congress added to the end of Section 523(a)(2)(A) the clause at issue in this case—"other than a statement respecting . . . financial condition"—which ensured that such statements would be subject to the added requirements in Section 523(a)(2)(B).

The relevant provisions of Section 523 enacted in 1978 have remained materially unchanged since.

II. THIS CASE

A. Factual Background

Lamar, Archer & Cofrin, LLP (Lamar), is a law firm established in 1982 in Atlanta, Georgia. In 2004, Appling hired Lamar and another law firm (Gordon), to represent Appling in connection with litigation against the former owners of a business he had recently purchased. Pet. App. 21a. Appling agreed to pay Lamar and Gordon for their services on an hourly basis with fees due monthly. *Id.* As the litigation

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no other debts" is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting.

516 U.S. at 77 n.13 (quoting H.R. Rep. No. 95-595, at 130).

proceeded, however, Appling fell behind in his payments for the services he received. *Id.*

By March 2005, Appling owed Lamar more than $60,000 and Gordon roughly $18,000 in unpaid legal fees. *Id.* Lamar informed Appling that if he were unable to bring fees current, Lamar would be forced to terminate its representation in an appropriate manner. *Id.* at 21a-22a. The parties met in Gordon's offices on March 18, 2005, to discuss the situation. *Id.* at 22a. At the meeting, Appling told Lamar and Gordon that he had consulted an accountant, and that he would soon be filing an amended tax return, entitling him to a tax refund of approximately $100,000—enough to cover current and anticipated legal fees. *Id.* at 22a, 54a. Based on that representation, Lamar and Gordon agreed to continue their representation of Appling. *Id.* at 41a, 61a.

Bills continued to go unpaid. And, in November 2005, Lamar and Appling met to discuss the outstanding legal fees again. At the meeting, Appling told Lamar that his accountant had improperly handled the amended return. *Id.* at 22a-23a, 57a. As a result, Appling claimed, he had been forced to refile the return himself, and so had not yet received his refund. *Id.* at 23a, 57a. Appling assured Lamar, however, that he still expected to receive an amount sufficient to cover all of his mounting legal fees. *Id.* at 23a. Once again, Lamar continued its representation of Appling on the basis of his assurances, ultimately obtaining a settlement of Appling's dispute that significantly lowered Appling's remaining financial obligations to the former owners of his business. *Id.* at 41a, 48a-49a, 61a-62a.

It turned out, however, that Appling had lied about his tax return. In June 2005, Appling did sign

and submit an amended tax return. *Id.* at 22a, 48a. But that return sought a refund of roughly $60,000, not the approximately $100,000 he had touted. *Id.* Moreover, Appling received the refund in October 2005—before the November 2005 meeting at which he claimed to have not yet received the refund (and asked Lamar and Gordon to continue their representation anyway). *Id.* at 22a, 48a-49a. And, contrary to his stated intent, Appling never paid any of the refund money he did receive to Lamar or Gordon, but instead spent it elsewhere. *Id.* at 23a.

When Lamar learned the truth in June 2006 that Appling had received the refund and used it on his own business, rather than paying his outstanding legal fees as he had promised, it understandably believed it had been swindled. Lamar demanded payment of all outstanding fees within 14 days. *Id.* And when Appling failed to satisfy Lamar's demand, Lamar sued Appling in Georgia state court, obtaining a judgment in October 2012 for the amount of the outstanding legal fees—$104,179.60. *Id.*

Three months later, Appling and his wife filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Their petition sought to discharge all of their personal debts, including the $104,000 judgment Lamar had obtained against Appling, while retaining exempt assets (*i.e.*, assets Appling and his wife would be allowed to keep) worth more than $550,000. *See id.*; Chapter 7 Voluntary Petition (Form B6C), *In re R. Scott Appling*, No. 13-30083 (Bankr. Ct. M.D. Ga. Jan. 18, 2013), ECF No. 1 (identifying more than $550,000 in property claimed as exempt).

B. Procedural History

1. In April 2013, Lamar initiated an adversary proceeding in the bankruptcy court for the Middle District of Georgia, seeking a determination that Appling's $104,000 debt to Lamar was not dischargeable under 11 U.S.C. § 523(a)(2)(A) because it was obtained by fraud. Appling moved to dismiss the complaint, arguing, among other things, that the prohibition on discharging such debts did not apply because the alleged false statements about his tax refund were "statement[s] respecting [his] . . . financial condition." Pet. App. 70a (omission in original) (quoting 11 U.S.C. § 523(a)(2)(A)).

The bankruptcy court denied Appling's motion. *Id.* at 67a-81a. Agreeing with the majority view in the courts of appeals on how to interpret the phrase "respecting the debtor's . . . financial condition," the court held that the anti-discharge exception is limited to "'communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities.'" *Id.* at 71a (citation omitted). Because Appling's alleged misrepresentations about "a single asset, the tax refund," were not representations about his "overall financial condition or net worth," the "other than" clause in Section 523(a)(2)(A) was inapplicable. *Id.* at 73a, 76a.

2. Following a two-day trial, the bankruptcy court issued findings of fact and conclusions of law resolving the adversarial proceeding. *Id.* at 45a-66a. The court found that Appling had "knowingly made a false representation with intent to deceive when he represented" that his tax refund would be "approximately $100,000" and, later, that "he had not yet received the refund." *Id.* at 54a, 58a. The court

accepted Appling's testimony that he had told Lamar and Gordon that the tax return had not yet been prepared by the time of the March 2005 meeting. *Id.* But based on Appling's shifting accounts and the testimony of others, the court found that Appling had lied when he told them at that meeting that his accountant had estimated that the refund would be upwards of $100,000. *Id.* at 54a-55a. The court also found that Appling had lied at the November 2005 meeting when he said he had not received the refund, pointing to the conflicting testimony of Appling's wife about that meeting. *Id.* at 58a-59a; *see id.* at 55a.

The bankruptcy court further found that Lamar relied on Appling's representations about the tax refund in providing services, was justified in so doing, and was harmed thereby. *Id.* at 62a-66a. The court rejected Appling's argument that Lamar could not have justifiably relied on Appling's lies about the tax refund because it was "fully aware of [Appling's] precarious financial condition" more generally, as a result of financial information about Appling's business provided to Lamar in the course of the representation. *Id.* at 61a-62a. Accordingly, the court held that Lamar's claim against Appling is not dischargeable under Section 523(a)(2)(A). *Id.* at 66a.

3. Appling appealed the bankruptcy court's decision to the district court. Like the bankruptcy court, the district court concluded that "[a] statement pertaining to a single asset is not a statement of financial condition." *Id.* at 29a. Because Appling's false statements concerned a "single asset," rather than his "financial condition" (*i.e.*, his "net worth, overall financial heath, or equation of assets and liabilities"), the court affirmed. *Id.* at 30a. In so holding, the court affirmed the bankruptcy court's

findings that Appling lied as to the tax refund. *Id.* at 32a-35a. The court also rejected Appling's argument that Lamar's supposed knowledge of Appling's overall "financial problems" precluded any reasonable reliance on Appling's lies about the tax refund itself. As the court observed, "[p]oor overall financial health does not inherently preclude the receipt of a substantial tax refund." *Id.* at 39a-40a.

4. Appling appealed again, and the Eleventh Circuit reversed. *Id.* at 1a-19a. In interpreting Section 523(a)(2)(A), the court of appeals acknowledged that "'financial condition' likely refers to the sum of all assets and liabilities," or "one's overall financial status." *Id.* at 7a-8a. Nevertheless, the court opined, "it does not follow that the phrase 'statement *respecting* the debtor's . . . financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (alteration in original) (citation omitted). The term "respecting" is "defined broadly," the court said, to mean "relates to" or "impacts." *Id.* at 8a-9a. And because a statement about a single asset represents "a partial step toward knowing whether the debtor is solvent or insolvent," the court held that such a statement unambiguously qualifies as a "statement respecting . . . financial condition." *Id.* at 9a.[2]

This Court granted certiorari.

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[2] Judge Rosenbaum concurred. She concluded that the statutory language was at least ambiguous, but nevertheless agreed with the majority based on her policy views. Pet. App. 18a (Rosenbaum, J., concurring in the judgment).

SUMMARY OF ARGUMENT

The text of Section 523(a)(2)(A), as well as other traditional indicia of Congress's intent, compel the conclusion that a statement about a single asset is not a "statement respecting . . . financial condition."

I. Starting with the text, it is undisputed that "financial condition" has a well-accepted meaning: one's *overall* financial status. Congress's use of the term "financial condition" therefore indicates that Congress was focused on overall financial status in Section 523(a)(2)(A). Yet, interpreting "respecting . . . financial condition" to include anything "*related to* financial condition" eviscerates that choice. Because "everything is related to everything else," *California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring), almost every statement that could support the extension of credit—even a statement about a single asset that makes no representation about the debtor's overall financial health—qualifies as a "statement respecting . . . *financial condition*." The Eleventh Circuit's construction of "respecting" thus negates the limitations inherent in the accepted meaning of "financial condition" as a relative term that refers to one's overall financial status.

By contrast, interpreting "respecting . . . financial condition" to mean "*about* financial condition" or "*concerning* financial condition" gives effect both to Congress's use of the "financial condition" limitation and also its use of "respecting" to describe the subject of the statement in question. Appling himself acknowledges that "respecting" can mean "about," "concerning," or the like. Using that meaning, the statute captures not only a detailed accounting of

one's overall financial status (such as a formal financial statement) but also less conventional descriptions of one's overall liquidity or a general statement like, "Don't worry, I am above water," without sweeping in every statement about a discrete pecuniary item (asset or liability) that does not actually concern one's overall financial status.

Sometimes, of course, Congress does use the phrase "related to." Indeed, Congress used that formulation elsewhere in the Bankruptcy Code and elsewhere in the 1926 enactment that first introduced the "statement respecting . . . financial condition" language to the federal bankruptcy laws. But the very fact that Congress used that "related to" formulation elsewhere in the same statutes, while choosing to use "respecting" in the provision at issue here, reinforces the conclusion that Congress intended "respecting" to mean something other than "related to." So does the common sense fact that Congress would have been unlikely to intend "statement respecting . . . financial condition" to have a meaning that would gravely undermine Section 523(a)(2)(A)'s anti-discharge rule where property or services were procured by fraud.

II. The text alone is sufficient to compel reversal of the Eleventh Circuit's decision, but the longstanding background principles against which Congress acted and the history of the statutory language in question further reinforce that Congress could not have intended the Eleventh Circuit's interpretation. As this Court has observed time and time again, the bankruptcy laws evince a "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (quoting *Grogan*, 498 U.S. at 287)). Congress undoubtedly was

well aware of that principle when it enacted the language at issue, and there is no indication that it intended the major departure from that rule that the Eleventh Circuit's reading would effectuate.

Instead, as this Court has already recognized, in adopting the language at issue, Congress simply sought to address a particular practice engaged in by some consumer finance companies as to a particular type of representation—"false financial statements." *Field*, 516 U.S. at 76. Interpreting Section 523(a)(2)(A) to except only statements *about* "financial condition" fully serves that interest, without undermining the background rule against which Congress legislated. Interpreting Section 523(a)(2)(A) to except all fraudulent statements *related to* "financial condition," by contrast, would reward a broad class of fraudsters (like Appling) far removed from the particular circumstances Congress sought to address. The Eleventh Circuit's decision would essentially free debtors to lie about their finances in order to dupe individuals or business into extending them credit, property, or services. Talk about hiding an "elephant in a mousehole."

III. Appling's and the government's remaining arguments also fail. First, the notion that Congress intended a broad interpretation of "statement respecting . . . financial condition" in order to obtain more "reliable evidence" in bankruptcy proceedings is sheer speculation. There is no evidence that Congress had either "reliability" or "evidentiary" concerns in mind when it adopted the amendments at issue. Nor is there any indication that Congress wanted to achieve such objectives by penalizing victims like Lamar who can show that they justifiably relied on intentionally false statements concerning specific

assets. This argument only underscores the problems inherent in relying on supposed, unstated legislative purposes to construe a statute's meaning.

Second, Congress did not seek to ratify any lower court interpretation that "statement respecting . . . financial condition" included every statement related to any specific asset or liability. The vast majority of pre-1978 cases applying the predecessor provision involved false financial statements about a debtor's overall financial condition—and thus are consistent with Lamar's interpretation of Section 523(a)(2)(A). Moreover, the few cases Appling identifies in which pre-1978 courts adopted a broader interpretation arose under a version of the bankruptcy laws in which proving that a debtor had made a false "statement respecting . . . financial condition" was a basis for *denying* discharge, rather than granting it. Thus, to the extent Congress sought to codify any case law in 1978, as Appling argues, it would have sought to affirm the then-existing rule that misrepresentations about specific assets would *bar* discharge.

Finally, the government's suggestion of "line-drawing problems" provides no basis for departing from the text either. Answering the question presented of whether a single asset qualifies as a "statement respecting . . . financial condition" will not create any line-drawing problems. Moreover, there is no evidence of any line-drawing problems in the circuits that have construed the statute narrowly in the way Lamar has proposed. Under either interpretation, the application of Section 523(a)(2)(A) will be case-specific. But the line-drawing problems this Court should be concerned about come from trying to articulate and enforce a meaningful "related to" limit, as the Eleventh Circuit's interpretation

would require the courts to do. This Court's own experience confirms the difficulty of *that* task.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISREAD THE TEXT OF SECTION 523(a)(2)(A)

"[I]nterpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (citation omitted). Here, the relevant language is "statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). The question is whether a statement concerning a specific asset qualifies as a "statement respecting the debtor's . . . financial condition." The Eleventh Circuit held that the statute unambiguously answers that question in the affirmative. Pet. App. 12a. That was error.

A. Congress's Use Of "Financial Condition" Is Telling

There is no dispute that lies about individual assets come within the general rule in Section 523(a)(2)(A) that the Bankruptcy Code "does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Thus, there is no question that Section 523(a)(2)(A) prohibits the discharge of the debt at issue, unless the last clause of the provision— "other than a statement respecting

the debtor's or an insider's financial condition"—exempts Appling's lies from the general rule.[3]

Even as to the meaning of the "other than" clause, there is significant common ground among the parties, the Eleventh Circuit, and the government. Neither Appling, the Eleventh Circuit, nor the government has disputed that "financial condition" is a term of art that refers to one's overall financial health or status. *See* Appling CA11 Br. 16; Pet. App. 8a-9a; U.S. Invitation Amicus Br. 14. As the Eleventh Circuit noted (Pet. App. 7a), the Bankruptcy Code itself uses "[f]inancial condition" to define "insolvent." Pet. App. 7a; *see* 11 U.S.C. § 101(32)(A) ("insolvent" means "*financial condition* such that the sum of such entity's debts is greater than all of such entity's property" (emphasis added)). "Financial condition" is thus different from a term like "finances," which refers not to an overall *status* but to individual financial items. *See, e.g.*, *Finance*, *Oxford English Dictionary* (online ed.), http://www.oed.com (last visited Feb. 26, 2018) ("*pl.* The pecuniary resources . . . of a company or an individual."); *Finances*, *Merriam-Webster.com* (online ed.), https://www.merriam-webster.com/dictionary/finances (last visited Feb. 23, 2018) ("money or other liquid resources of a government, business, group, or individual").

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[3] The Bankruptcy Code defines "insider" to include a "relative of the debtor or of a general partner of the debtor;" "partnership in which the debtor is a general partner;" "general partner of the debtor, or;" "corporation of which the debtor is a director, officer, or person in control." 11 U.S.C. § 101(31)(A). Because Appling is a debtor, this case does not concern an "insider."

"Financial condition" was a familiar term long before the Bankruptcy Code's adoption in 1978. At the time the "statement respecting . . . financial condition" language was first integrated into federal bankruptcy law in 1926, reference materials explained that a business's "financial condition" "considered (a) balance between assets and liabilities, and nature of each, (b) relation of current assets to current liabilities and turnover of stock, (c) insurance carried, (d) method of paying debts, (e) proportion of capital invested and borrowed," and so forth. Richard P. Ettinger & David E. Golieb, *Credits and Collections* 95 (2d ed. 1917), https://ia802604.us.archive.org/20/items/creditsandcolle01goligoog/creditsandcolle01goligoog.pdf.

Likewise, "financial condition" was commonly used to refer to one's overall financial status. For example, in the 1920s, credit agencies like the Bradstreet Company mailed forms to businesses "respectfully request[ing] that you furnish us a statement of your financial condition, on the within form," accompanied by a form on which the company requested various financial information, including assets, liabilities, insurance coverage, and other similar information. Robert H. Montgomery, *Auditing Theory And Practice* 398 (3d ed. 1921), https://play.google.com/books/reader?id=5fFCAAAAIAAJ (reproducing a sample form from the Bradstreet Company); *see also id.* at 397 (noting that "[t]hese forms are supplied to practically every business concern, and are therefore more familiar to the average business man than any others"). And, as discussed (*see supra* at 8-9), it was the widespread use of the reports that credit agencies produced from these wide-ranging statements about "financial

condition" that prompted the addition of the "statement respecting . . . financial condition" language to the bankruptcy laws in the first place.

Congress's use of "financial condition," as opposed to something like "finances" or "financial information" (either of which would cover a broad universe of items regardless of one's *overall* state), therefore is telling—and, like the rest of the statute, must be given effect. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (applying "the settled rule that we must, if possible, construe a statute to give every word some operative effect"); *United States v. Standard Brewery Co.*, 251 U.S. 210, 218 (1920) ("It is elementary that all of the words used in a legislative act are to be given force and meaning . . . . It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect.").

B. The Eleventh Circuit's Open-Ended Construction Of "Respecting" Does Not Withstand Scrutiny

Of course, Section 523(a)(2)(A) does not refer to "financial condition" in isolation. It says "statement respecting . . . financial condition." The Eleventh Circuit was right to consider the surrounding text, but ultimately it drew the wrong conclusion from context. Zeroing on the use of "respecting," the Eleventh Circuit pointed to dictionary definitions and various uses of "respecting" in which the word is used broadly to mean "'[w]ith regard or relation to.'" Pet. App. 8a. Based on such sources, it concluded that anything that "'relates to' or 'impacts' a debtor's overall financial condition," or provides even "a partial step toward knowing whether the debtor is

solvent or insolvent," unambiguously qualifies as a "statement respecting . . . financial condition." *Id.* at 9a. That construction does not withstand scrutiny.

1. The Eleventh Circuit's nearly myopic focus on "respecting" violates at least two fundamental principles of statutory construction: first, "the words of a statute must be read in their context," *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); and, second, "all of the words used in a legislative act are to be given force and meaning," *Standard Brewery*, 251 U.S. at 218; *accord Cooper Indus., Inc.*, 543 U.S. at 167; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167, 174 (2012) ("Context is a primary determinant of meaning"; "If possible, every word . . . is to be given effect").

Here, Congress used "respecting" alongside "financial condition"—a relative term that refers to one's overall financial status, not any particular asset or liability. By failing to read "respecting" in context, the Eleventh Circuit adopted a construction of the statute that renders Congress's use of "financial condition" largely meaningless. Under that view, any statement *related to* one's finances, or that *impacts* one's finances, qualifies as a "statement respecting . . . financial condition"—regardless of whether it says anything about one's *overall* financial status. Pet. App. 9a. That reading thus renders Congress's use of "financial condition" indistinguishable from a formulation like "respecting the debtor's *finances*" or "respecting the debtor's *assets or liabilities*."

"But"—as this Court recently observed in a similar context—"Congress didn't choose those other words. And respect for Congress's prerogatives as

policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, ___ S. Ct. ____, No. 16-1067, 2018 WL 987346, at *2 (U.S. Feb. 21, 2018); *see also, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (holding that a statute should not be construed so as to render a term "insignificant"). The Eleventh Circuit's construction effectively replaces "financial condition" with "financial information" or the like.

2. This would be a far more difficult case if the Court had to pick between giving effect to Congress's use of "respecting" or its use of "financial condition." But it doesn't. Although it is true that "respecting" *can* be "defined broadly," Pet. App. 8a, it isn't always used that way. "Respecting" is often used to mean "about." *Respecting, Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1977); *see also Thorndike Comprehensive Desk Dictionary* (1957) ("With respect to; about; concerning"); *Webster's New World College Dictionary* (4th ed. 2010) ("concerning; about"). In a similar vein, "respecting" can mean "with reference to" or "as regards," thereby indicating the subject or focus of a given statement. *Respecting, prep., Oxford English Dictionary* (online ed.), http://www.oed.com (last visited Feb. 22, 2018); *see also Webster's Collegiate Dictionary* (1925) ("1. Considering; in view of. 2. With regard to; concerning."). Appling himself recognizes these additional meanings. BIO 14 (citing *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967) (defining "respecting" to include "concerning," "about," "regarding," and "in regard to")).

A "statement respecting . . . financial condition," on that reading, is a statement that is "about," or that makes "reference to," the debtor's overall financial

state or well-being. And, indeed, that is how this Court has understood the phrase in the past, recognizing that Congress was concerned with "lies *about* financial condition." *Field v. Mans*, 516 U.S. 59, 76-77 (1995) (emphasis added). That definition would include the kinds of "financial statements" used by creditors on which Congress evidently was focused (both in 1926 and when it adopted the amendments at issue in 1978) requiring loan applicants to provide a detailed listing of various financial data (rather than to simply identify a discrete asset or liability). It would also include less formal or detailed descriptions of financial status, such as a representation about one's credit score or net monthly cash flow, or a statement that "I am in good financial shape." But it would not include statements, like the lies at issue here, that were not "about" or made no "reference to" the debtor's overall financial condition, but instead described only a single specific asset.

A statement about a single asset, such as a car pledged as collateral on a loan, might well be material to the decision to extend credit in a given case. But a statement about a single asset cannot naturally be described as a statement about one's *overall* financial status. This case itself illustrates the point. When it came to the statute's reliance element, Appling argued that Lamar could not have reasonably relied on Appling's lies about his tax refund because Lamar supposedly knew about Appling's "poor financial condition" and "financial problems" based on Lamar's knowledge of Appling's business. Pet. App. 39a; *see id.* at 39a-40a; *id.* at 61a-62a. The two may be connected, but as the district court observed, "[p]oor overall financial health does not inherently preclude receipt of a substantial tax refund." *Id.* at 40a.

Importantly, this interpretation—unlike the Eleventh Circuit's—gives meaningful effect to *both* "respecting" *and* "financial condition." "Respecting" broadens the scope of statements about one's overall financial status or health that qualify beyond a classic financial statement or balance sheet. For example, the statement could be a credit application that contains a detailed list of various financial data that show liquidity, a general reference to one's financial health like "I am solvent," or any number of other statements providing a more holistic snapshot of one's financial status. But under this interpretation, Congress's decision to use "financial condition," as opposed to "finances" or "financial information," is still respected. *See Murphy*, 2018 WL 987346, at *2.

3. The statutory history of the "statement respecting . . . financial condition" language bolsters this construction. As discussed above, Congress first used that phrase in the 1926 Act. In that same Act, Congress added a separate provision imposing a penalty for falsifying records "affecting or *relating to* the property or affairs of a bankrupt." Pub. L. No. 69-301, § 11, 44 Stat. 662, 665 (1926) (emphasis added). That Congress chose to use the "respecting . . . financial condition" language in the anti-discharge provision of the 1926 Act—instead of the broader "affecting or relating to the property or affairs of a bankrupt" language used in Section 11—underscores that Congress intended a narrower meaning there. Congress also used the phrase "relating to financial condition" elsewhere in the 1978 Bankruptcy Code, *see* 11 U.S.C. § 1142(a), underscoring that Congress did not intend "respecting . . . financial condition" to mean "*relating to* financial condition."

As this Court has explained, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). And the "'[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted,'" *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (citation omitted), as is the case here.

Appling himself has recognized that Congress knows how to say "relating to" when it wants to. *See* BIO 16-17 (noting that the Airline Deregulation Act "preempts state laws '*relating to* rates, routes, or services of any air carrier'" (emphasis added in original) (citation omitted)). That only reinforces the point that, if Congress really had wanted to go so far as exempting any statement "relating to" financial condition, it would have said so. But Congress instead chose to exempt from discharge only "statement[s] respecting . . . financial condition." The Eleventh Circuit's construction negates that choice.

4. The Eleventh Circuit's construction also contravenes the rule that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner, *supra*, at 63. Here, the "clear purpose of [Section 523(a)(2)(A)], as gathered from the words alone," is to protect *creditors* from the frauds perpetrated upon them by debtors who have lied in order to gain property or services from them. *Id.* Obviously the last clause of the provision carves out

an exception, but the question is *how big* an exception? As between two possible interpretations—one producing a targeted exemption for statements about one's overall financial status and another creating a major loophole for statements in any way related to one's finances—the former is plainly the one that furthers the "document's purpose."

If a "statement respecting . . . financial condition" includes anything "related to" a debtor's finances, little will be left to be covered by Section 523(a)(2)(A)'s general rule—under which debts for "money, property, services, or an extension, renewal, or refinancing of credit . . . obtained by . . . a false representation" are generally nondischargeable. That is because, as Justice Scalia observed in a similar vein, "everything is related to everything else." *See California Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (concurring) ("[A]pplying [ERISA's] 'related to' provision according to its terms would be a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."); *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 149 (2009) (quoting same with approval). The Eleventh Circuit's interpretation gives the "other than" carve-out an implausibly broad reach and transforms a general rule barring the discharge of debts procured through fraud into a license to lie to the moon about one's finances.

After all, what representation leading to the extension of credit or property, for example, is *not* in some way "related to" the debtor's financial condition? As one court put it, "it is difficult to conceive of any false representation regarding an asset or a particular financial condition that could justifiably

induce 'an extension, renewal or refinancing of credit' that would not also be a 'statement respecting the debtor's . . . financial condition' under the broad interpretation." *Barnes v. Belice (In re Belice)*, 461 B.R. 564, 577 n.8 (B.A.P. 9th Cir. 2011) (alteration in original) (citation omitted). "And yet the plain language of § 523(a)(2) contemplates on its face the existence of such representations, even if the broad interpretation renders them all but inconceivable." *Id.*

Appling has suggested that a debtor might lie about his job qualifications or the purpose of a particular payment, and that those statements would not fall within the Eleventh Circuit's rule. BIO 15 n.1. But the Eleventh Circuit, for its part, was non-committal on such a statement. *See* Pet. App. 12a. And it is hardly obvious that lying about one's ability to make money, or the purposes for which one's money is going to be used, is not "related to" one's financial condition under the Eleventh Circuit's construction, which sweeps in statements that refer to anything "impact[ing]" one's financial status—in "part[]." *Id.* at 9a. In any event, drawing those lines would provide bankruptcy courts—and attorneys—with full-time employment for years to come.

Of course, where Congress actually says "related to," as it did in the ERISA preemption provision that prompted Justice Scalia's "everything is related to everything else" quip in *California Division of Labor Standards Enforcement* (519 U.S. at 335 (concurring)), and in the contrasting provision of the 1926 Bankruptcy Act discussed above (*supra* at 29-30), the courts must attempt to interpret that phrase as best they can. But as this Court's own ERISA preemption jurisprudence attests, that endeavor is

hardly a walk in the park. And where Congress has *not* used "related to" language, and where the language Congress actually used can be naturally read to have a more limited reach, there is no reason to presume that Congress intended to embark on the "project doomed to failure" of finding the outer limits of "related to." *California Div. of Labor Standards Enf't*, 519 U.S. at 335 (Scalia, J., concurring).

That is especially true where, as here, adopting an open-ended "related to" construction would defeat the central anti-fraud rule embodied by the statute at issue. Even if courts ultimately decided that statements about job qualifications and spending plans were somehow not "related to" a debtor's financial condition, it would remain the case that *most* statements made in an effort to secure credit, property, or services—indeed, anything related to finances—would come within the "other than" carve-out under the Eleventh Circuit's decision. For that reason, construing "statement respecting . . . financial condition" to mean anything that is "related to" or "impacts" finances would impermissibly cause the exception to take a huge bite out of Section 523(a)(2)(A)'s general anti-discharge rule. *See Regents of the Univ. of Cal. v. Public Emp't Relations Bd.*, 485 U.S. 589, 600 (1988) (declining to read exception in a way that "would swallow the rule").

C. The Court Can, And Should, Give Effect To All The Words Congress Used

For these reasons, the better, more natural, and correct construction of Section 523(a)(2)(A) is that "respecting . . . financial condition" means "about" or "with regard to" a debtor's overall financial status or health. That construction gives effect to both

Congress's use of "respecting" and "financial condition," it honors Congress's choice not to use the "affecting or relating to" language that it employed elsewhere, and it furthers the "document's purpose" as an anti-fraud provision (Scalia & Garner, *supra*, at 63). The text of the statute by itself, therefore, compels reversal of the Eleventh Circuit's decision.

II. THE CENTURIES-OLD "HONEST DEBTOR" PRINCIPLE AS WELL AS THE HISTORY OF THE PROVISION AT ISSUE REINFORCE THE CONCLUSION THAT THE ELEVENTH CIRCUIT MISREAD SECTION 523(a)(2)(A)

The Court need go no further to resolve this case. But in any event, other considerations reinforce the conclusion that Congress did not intend the construction reached by the Eleventh Circuit.

A. This Court Does Not Lightly Assume That Congress Intends A Bold Departure From Existing Practice

When Congress adopted the provision at issue in 1978, it did not write on a blank slate. It acted against the backdrop of the settled understanding that the bankruptcy laws embody a "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). As the United States has explained to this Court, "[t]he policy against discharging debts incurred by fraud is deeply embedded in the bankruptcy law, and has been recognized in every bankruptcy statute since the Act of March 2, 1867." U.S. Amicus Br. 13, *Grogan v. Garner*, 498 U.S. 279 (1991), 1990 WL 10022411.

Congress was unquestionably aware of that deeply entrenched policy when it enacted the Bankruptcy Code in 1978. And "[i]t is not lightly to be assumed that Congress intended to depart from [such a] long established policy." *United States v. Wilson*, 503 U.S. 329, 336 (1992). That is especially true here, where the question boils down to whether the perpetrator of a fraud should receive the bankruptcy law's aid in resisting his victim's effort to be made whole. It is, at the least, "unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan*, 498 U.S. at 287. Certainly there is nothing in the record that suggests that Congress viewed the 1978 amendments as an occasion for a radical rethinking of and departure from the time-honored "honest but unfortunate debtor" principle.

To be sure, Congress wanted to carve an exception to the longstanding anti-fraud principle as embodied in Section 523(a)(2)(A). But the Eleventh Circuit's interpretation takes a sledgehammer to that principle. Under the Eleventh Circuit's interpretation, fraudsters can swindle innocent victims for money, property, or services by lying about their finances, then discharge the resulting debt in bankruptcy, just so long as they do so orally. Pet. App. 8a-9a. Any debts procured through lies that "relate to" or "impact" one's financial situation in anyway, even in part, are protected. *Id.* Thus, lies about whether one owns an asset offered for collateral, lies about how much that asset is worth, lies about whether the asset is unencumbered, lies about the existence (or nonexistence) of specific debts, and so on—any such statement, so long as it was made orally, is exempt from the anti-discharge rule.

"[S]uch a bold departure from traditional practice would have surely drawn . . . explicit statutory language and legislative comment." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)); *see also Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). But neither Appling nor the Eleventh Circuit have pointed to, and we are not aware of, any indication in the legislative record Congress had any major shift like this in mind, or that some sudden groundswell to come to the aid of fraudulent debtors had developed on Capitol Hill.

B. The Statute's History Underscores That Congress Intended Only A Narrow Exception To Settled Practice

The absence of any evidence that Congress intended a bold shift in the centuries-old background principle that bankruptcy protection is reserved for the "honest but unfortunate debtor" is not surprising. As this Court itself has already explained, Congress had something entirely different—and far more targeted—in mind: it added the provision at issue to address a specific abuse by some creditors who were exploiting the use of "financial statements" in connection with consumer loan applications. *Field*, 516 U.S. at 76-77 & n.13. In other words, the history of the 1978 changes in Section 523(a)(2)(A) shows that Congress in fact intended to take a scalpel, not a sledgehammer, to the anti-fraud rule.

In *Field*, the Court described how Congress added the exception for "statements respecting . . . financial condition" to Section 523(a)(2)(A) in order to "moderate the burden on individuals who submitted false financial statements." 516 U.S. at 76. It did so "not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Id.* at 76-77. Congress was thus focused on a creditor practice that specifically involved written financial statements, as demonstrated by the House Report's discussion of the changes to Section 523(a)(2) under the heading "False financial statements." H.R. Rep. No. 95-595, at 129 (1977). And even there, Congress's response was not to immunize debtors who had intentionally defrauded genuinely blameless creditors, but instead merely to increase the particular showing the creditor would need to make as to that specific category of fraud.

To be sure, Congress did not limit its 1978 amendment to only classic financial statements; its "statement respecting ... financial condition" language also encompasses less formal statements about a debtor's overall financial health, such as a statement that the debtor is credit-worthy. Originally, that broader phrase was necessary to ensure that the 1926 amendments would extend to debtors who caused credit agencies to publish a (falsely) positive credit rating of the debtor, without publishing the debtor's full financial statement. *See supra* at 8-9. And moving forward, that language prevented creditors from circumventing Congress's

intent by simply re-styling their forms or framing their inquiries in a slightly different way to request the overall picture without the detail.

But there is no basis to conclude that, in targeting a specific abusive practice by some creditors in requiring applicants for consumer loans to complete written financial statements in the hopes that they would inaccurately complete the forms, Congress intended to sweep in a broad class of statements—such as statements referring to a single asset—as to which there was *no* evidence of creditor abuse and thus no reason to depart from the "basic policy . . . of affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (citation omitted).

III. APPLING'S AND THE GOVERNMENT'S REMAINING ARGUMENTS LACK MERIT

None of Appling's or the Government's remaining arguments for adopting the Eleventh Circuit's interpretation withstands scrutiny.

A. Congress Did Not Decide To Excuse Certain Oral Frauds To Promote More "Reliable Evidence"

Appling claims (BIO 18-19) that his construction advances a supposed "legislative purpose" of creating "more reliable" evidence of frauds by "encourag[ing] creditors to rely on written statements." To get creditors to use written statements more frequently, the theory goes, Congress simply withdrew protection for creditors who are victimized by frauds perpetrated by oral statements. The Eleventh Circuit likewise opined that, while its rule "may seem harsh after the fact, especially in the case of fraud, . . . it gives creditors an incentive to create writings before the

fact, which provide the court with reliable evidence upon which to make a decision." Pet. App. 13a.

There are several glaring flaws with this "legislative purpose" (BIO 18) argument. To begin with, Appling has identified no evidence that this *was* in fact the legislature's purpose. In neither his Brief in Opposition here, nor his court of appeals brief below, did Appling point to anything in the legislative record indicating that Congress desired to encourage more statements in writing by refusing protections to creditors who have been defrauded by oral misrepresentations. Nor did the Eleventh Circuit. It invoked the "Statute of Frauds" and "Uniform Commercial Code" as evidence of that the "law sometimes requires proof be in writing as a prerequisite to a claim for relief," Pet. App. 13a, but cited nothing in the legislative record indicating that Congress had any such purpose in mind here. This "purpose" argument therefore suffers from all of the flaws inherent in construing a statute to advance a purpose or background principle that Congress never identified. *See* Scalia & Garner, *supra*, at 56-57.

Moreover, if Congress truly desired that creditors only rely on written statements, there is no apparent reason why it would have withdrawn anti-discharge protection for oral statements "related to" a debtor's finances but preserved anti-discharge protection for whatever slim category of other oral statements remain covered by Section 523(a)(2)(A) on Appling's reading. Why, in other words, maintain an anti-discharge provision at all for debts procured through fraudulent oral statements? Or why would Congress insist on more "accura[te]" proof of a lie about one's finances than a lie about one's "job qualifications" or the "purpose and recipient of a payment" (BIO 15 n.1,

18)? There is no apparent reason why oral falsehoods about the former would be any more difficult to prove than oral falsehoods about the latter.[4]

Furthermore, to the extent that the Eleventh Circuit and Appling rely on some general notion that a fraud must be proved by a written instrument, they are mistaken. The Statute of Frauds and Uniform Commercial Code, which the Eleventh Circuit invoked, do impose "the requirement of a writing" (Pet. App. 13a), but only for a limited category of contracts, and only for purposes of policing the *enforceability* of such contracts. Lamar is not seeking to enforce a "contract" here; it is seeking to prevent the discharge of a confirmed debt obtained by fraud. And there is not, and never has been, a general rule of law or practice that "fraud" must be proved by the existence of a written instrument, whether for the purpose of creating more "reliable evidence" or to create an "incentive" to reduce frauds to writing. *Id.* Indeed, "fraud" is routinely—and convincingly—proved through oral testimony. That testimony must be tested through cross-examination or the like, as it was here. But there is no general rule that a fraud must be committed to writing to be cognizable by law.

A carve-out to an anti-fraud provision in the Bankruptcy Code also is hardly the place that

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[4] Under our view, by contrast, Congress's focus on false financial statements made in writing simply reflects the fact that the specific abusive practice on which it was focused involved such statements. *See Field*, 516 U.S. at 76 (explaining that Congress's decision to use slightly different reliance standards in Section 523(a)(2)(A) and (B) was "tied to the peculiar potential of financial statements to be misused not just by debtors, but by creditors who know their bankruptcy law").

Congress would start if it wanted to encourage greater reliance on written records. After all, the withdrawal of protection for oral statements only matters in circumstances where a creditor justifiably relied on the statement in question and can prove all of the other elements of its claim (including that the falsity was intentional and material). *See Field*, 516 U.S. at 68, 74-75 (describing elements required to establish applicability of Section 523(a)(2)(A)'s anti-discharge provision). And if a creditor's reliance on a given oral misrepresentation is otherwise justifiable, there is virtually no chance that the creditor will nevertheless decide *not* to rely on that oral statement, and to instead demand that the statement be made in writing, because of some remote fear that the borrower will turn out to be scamming it and will seek to discharge the resulting debt in bankruptcy. Appling's reading, in other words, will not have *ex ante* effects on creditor conduct. Instead, its only effect will be to deny recoveries to creditors who justifiably relied on statements that borrowers made for the express purpose of defrauding them—a result there is absolutely no reason to believe Congress intended. *See Grogan*, 498 U.S. at 287.

Finally, to the extent that the Eleventh Circuit believed that creditors should be required to protect themselves by demanding that all statements with an impact on finances be reduced to writing, it improperly substituted its own policy preferences for those of Congress. It was also mistaken in believing that creditors could "easily" comply with its preferred course. Pet. App. 13a. Even assuming bigger and more sophisticated commercial entities would be aware of the existence and judicial construction of Section 523(a)(2), and could protect themselves by

demanding that statements related to finances be made in writing, the Eleventh Circuit's interpretation would represent a fundamental change for small businesses and individuals who may not always have the sophistication or leverage to demand that any finance-related statements be made in writing. *See In re Soderlund*, 197 B.R. 742, 746 (Bankr. D. Mass. 1996) (noting that a broad reading of "statement respecting . . . financial condition" would allow "egregious frauds . . . to be perpetrated upon naïve lenders," who "would mostly likely be amateur lenders—friends, family, and the like—rather than banks and other institutional lenders").

There is no indication that Congress intended to expose everyday creditors and ordinary Americans in that manner—whether in the name of protecting fraudsters or pursuing some unstated goal of improving the supposed quality or reliability of evidence in bankruptcy proceedings.

B. Congress Did Not Ratify A Supposedly Pre-Existing Broad Interpretation Of The Language At Issue

Appling has also suggested that when Congress enacted Section 523(a)(2)(A) in 1978, it meant to ratify the courts' supposedly "uniform[]" understanding that the phrase "statement respecting . . . financial condition" included statements about individual assets. BIO 24-25 (emphasis omitted). That argument also should be rejected.

As discussed above, Congress initially adopted the "statement respecting . . . financial condition" language in 1926 in response to debtors' efforts to evade the existing anti-discharge requirements by causing credit reporting agencies to publish balance

sheets or credit scores that incorrectly described their overall financial health. *See supra* at 8-9. And in the half century between that enactment and the passage of the Bankruptcy Code in 1978, the vast majority of cases that addressed the application of that provision involved similar financial statements describing the borrower's *overall* financial health.[5]

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[5] *See, e.g., Gardner v. American Century Mortg. Inv'rs (In re Gardner)*, 577 F.2d 928, 929 (5th Cir. 1978) (no discharge where both assets and liabilities were falsified on financial statement); *In re Weinroth*, 439 F.2d 787, 788 (3d Cir. 1971) (addressing effect of false financial statement prepared by an accountant); *Palter v. Lake Sales, Inc. (In re Palter)*, 435 F.2d 120, 121 (9th Cir. 1970) (no discharge when debtor submitted financial statement overstating his net profit by 100%); *Clancy v. First Nat'l Bank*, 408 F.2d 899, 903 (10th Cir.) (no discharge where debtor submitted a joint financial statement for himself and his wife that failed to disclose other substantial loan obligations), *cert. denied*, 396 U.S. 958 (1969); *In re Barbato*, 398 F.2d 572, 574 (3d Cir. 1968) (false financial statement); *Schweizer v. City Loan Co. (In re Schweizer)*, 271 F.2d 95, 96-97 (7th Cir. 1959) (discharge should not have been granted where debtor failed to list debts to family members in financial statement); *In re Marcus*, 253 F.2d 685, 687 (2d Cir. 1958) (no discharge under Section 14 where corporation issued false financial statement); *Rogers v. Gardner*, 226 F.2d 864, 866 (9th Cir. 1955) (no discharge under Section 14 where debtor provided false financial statement misrepresenting net worth); *Cunningham v. Elco Distribs., Inc.* 189 F.2d 87, 90 (6th Cir. 1951) (no discharge where debtor falsified ownership of real estate on a financial statement); *Yates v. Boteler*, 163 F.2d 953, 959-60 (9th Cir. 1947) (no discharge where debtor caused Dun & Bradstreet to publish false estimate of net worth); *In re Lovich*, 117 F.2d 612, 614-15 (2d Cir. 1941) (financial statement to Dun & Bradstreet that had false liabilities and false net worth would have barred discharge if the statement was not issued by an agent without bankrupt's knowledge); *In re Keller*, 86 F.2d 90, 91 (2d Cir. 1936) (discharge barred where debtor falsified assets and liabilities on a financial statement); *In re Lilyknit Silk Underwear Co.*, 64 F.2d 404, 405-

Appling has cherry picked a few cases in which, he says, courts interpreted the anti-discharge provision to also include statements about individual assets. Some of the cases cited by Appling do not actually engage with the issue, *see Tenn v. First Hawaiian Bank*, 549 F.2d 1356, 1357-58 (9th Cir. 1977) (per curiam), and others actually undermine his interpretation, *e.g.*, *Albinak v. Kuhn (In re Manufacturers Trading Corp.)*, 149 F.2d 108, 110 (6th Cir. 1945). But the more salient point is that, if Congress was aware of any lower court case law in this area in 1978, it would have been familiar with the

---

06 (2d Cir. 1933) (no discharge barred where debtor issued to Dun & Co. a financial statement overstating assets); *In re Sewell*, 361 F. Supp. 516, 518 (S.D. Ga. 1973) ("The false statement by which a bankrupt obtains credit which will bar discharge must be a financial statement as distinguished from mere misrepresentations."); *In re Solari Furs*, 263 F. Supp. 658, 663 (E.D. Mo. 1967) (false financial statement given to credit rating agency was a false statement respecting the financial condition of the partnership); *In re Lomax*, 233 F. Supp. 889, 891 (M.D.N.C. 1964) (no discharge where debtor intentionally omitted a substantial portion of his liabilities in his financial statement); *In re Lepley*, 227 F. Supp. 983, 986 (W.D. Wis. 1964) (finding no reliance on financial statement that failed to identify certain liabilities); *In re Simms*, 202 F. Supp. 911, 912 (E.D. Va. 1962) (considering effect of false financial statement following 1960 amendments); *In re Johnson*, 114 F. Supp. 396, 402 (N.D. Tex. 1953) ("The bankrupt knowingly made a materially false financial statement to Dun & Bradstreet, Inc."); *Beneficial Fin. Co. v. Machie*, 263 A.2d 707, 709-10 (Conn. Cir. Ct. 1969) (debt nondischargeable when financial statement omitted several debts); *Beneficial Fin. Co. v. Lathrop*, 207 So. 2d 220, 221-22 (La. Ct. App. 1968) (debt nondischargeable when procured through false financial statement); *Personal Fin. Co. v. Bruns*, 84 A.2d 32, 33 (N.J. Super. Ct. App. Div. 1951) (finding debt was not subject to discharge where it had been obtained through a false financial statement).

mine run of cases—such as those cited in note 5—that involved false financial statements.

Moreover, Appling's statutory ratification argument suffers from a perhaps even more basic flaw. At the time that the cases cited by Appling were decided, finding that a statement was one "respecting . . . financial condition" was a basis for *denying* discharge rather than allowing it. *See* 11 U.S.C. § 32(b)(3) (1926); Pub. L. No. 86-621, § 2, 74 Stat. 408, 409 (1960); BIO 25. Thus, in all the older cases that Appling invokes—even the ones that actually involved fraudulently procured debts tied to statements about specific assets—the courts held that the debts in question could not be discharged. The fact that some courts may have erred in construing the phrase in a way that *furthered* the "honest but unfortunate debtor" policy is hardly a basis to conclude that Congress intended to abandon that policy when it amended Section 523(a)(2)(A) in 1978.

The floor statement on which Appling relies in arguing that Congress "intended to codify current case law" in 1978 therefore is hardly evidence that Congress intended all such debts procured by fraud to suddenly become dischargeable (even assuming a floor statement is evidence of *Congress's* intent to begin with). 124 Cong. Rec. H11,089 (Sept. 28, 1978), as reprinted in 1978 U.S.C.C.A.N. 6436, 6453 (quoted in BIO 27). To the contrary, a codification of "current case law" would have affirmed the then-existing rule that debts procured through misrepresentations about specific assets were *not* subject to discharge.

C. It Is The Eleventh Circuit's Interpretation, Not Lamar's, That Invites "Line-Drawing Problems"

Finally, the government argues that the narrow interpretation of Section 523(a)(2)(A) will "entail substantial line-drawing problems." U.S. Invitation Amicus Br. 18. That is incorrect. To begin with, the only question presented here is whether a statement about a single asset qualifies as a "statement respecting . . . financial condition." As the circuit conflict on this issue underscores, that is the question on which the courts have struggled in applying Section 523(a)(2)(A) and that tends to come up most frequently. Answering that question in the negative will not create any line-drawing problems: either a statement about a single asset qualifies, or it doesn't.

Instead, the interpretation that invites line-drawing problems is the Eleventh Circuit's, given the indefinite nature of "related to." *See supra* at 31-33. Neither Appling nor the government offers any concrete test for deciding where "relatedness" ends when it comes to a debtor's finances. Just where is the stopping point? And the government's new test that the statement must be "offered by the debtor as evidence of his ability to pay" (U.S. Invitation Amicus Br. 14) will only complicate matters. Not only is this element absent from the statute, but it introduces an additional, subjective layer to the inquiry. The same statement might, or might not, qualify as a "statement respecting . . . financial condition," depending on how the debtor *intended* his or her lie to be understood. Congress avoided these problems by simply requiring a creditor to show that the debt was

"obtained by" the fraud. *See* 11 U.S.C. § 523(a)(2)(A); *Field*, 516 U.S. at 73-75.

In any event, there is no evidence in the case law from the circuits that have adopted the "narrow" interpretation of Section 523(a)(2)(A) that this interpretation has proved unworkable in practice. And any uncertainties at the margin in applying this construction will pale in comparison to attempting to articulate and then police the outer limits of a "relating to" finances test. *See supra* at 31-33. The government's line-drawing argument therefore provides no reason to transform the targeted exception that Congress adopted in Section 523(a)(2)(A) to address a particular abusive practice into a major departure from the centuries-old rule that the bankruptcy laws are designed to protect the "honest but unfortunate debtor."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Bankruptcy Act of 1898, ch. 541

CHAP. 541—An Act To establish a uniform system of bankruptcy throughout the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

CHAPTER III.

BANKRUPTS

* * *

SEC. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and contemplation of bankruptcy, destroyed, concealed, or failed to keep books of

account or records from which his true condition might be ascertained.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

* * *

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

* * *

11 U.S.C. § 32 (1932)

§ 32. Discharges; when granted. (a) Any person may, after the expiration of one month and within twelve months, subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

(b) The judge shall bear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) destroyed, mutilated, falsified, concealed, or failed to keep books of account, or records, from which his financial condition and business transactions might be ascertained; unless the court deem such failure or acts to have been justified, under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property,

with intent to hinder, delay, or defraud his creditors; or (5) has been granted a discharge in bankruptcy within six years; or (6) in the course of proceedings in bankruptcy, refused to obey any lawful order of or to answer any material question approved by the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this paragraph (b), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt: *And provided further*, That the trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do by the creditors at a meeting of creditors called for that purpose on the application of any creditor.

(c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. (July 1, 1898, c. 541 § 14, 30 Stat. 550; Feb. 5, 1903, c. 487, § 4, 32 Stat. 797; June 25, 1910, c. 412, § 6, 36 Stat. 839; May 27, 1926, c. 406, § 6, 44 Stat. 663.)

11 U.S.C. § 35 (1932)

§ 35. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (first) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (second) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another or for alimony due or to become due, or for maintenance or support of wife or child, or for sednction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (third) have not been duly scheduled in time for proof and allowance, with the name of tbe creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (fourth) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity; or (fifth) are for wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of the proceedings in bankruptcy; or (sixth) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment. (July 1, 1898, c. 541, § 17, 30 Stat. 550; Feb. 5, 1903, c. 487, § 5, 32 Stat. 798; Mar. 2, 1917, c. 153, 39 Stat. 999; Jan. 7, 1922, c. 22, 42 Stat. 354.)

11 U.S.C. § 32 (1964)

§ 32. Discharges; when granted.

(a) The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided*, That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

(b) After the filing fees required to be paid by this title have been paid in full the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge which shall be not less than thirty days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94 (b) of this title. If the examination of the bankrupt concerning his acts, conduct, and property has not or will not be completed within the time fixed for the filing of objections to the discharge the court may, upon its own motion or upon motion of the receiver, trustee, a creditor, or any other party in interest or for other cause shown, extend the time for filing such objections. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as

will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

(c) The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title; or (6) in the course of a proceeding under this title refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or

deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

(d) When requested by the court, the United States attorney, located in the judicial district in which the bankruptcy proceeding is pending, or such other attorney as the Attorney General may designate, shall examine into the acts and conduct of the bankrupt and, if satisfied that probable grounds exist for the denial of the discharge and that the public interest so warrants, he shall oppose the discharge of such bankrupt in like manner as provided in the case of a trustee.

(e) If the bankrupt falls to appear at the hearing upon the objections to his application for a discharge, or having appeared refuses to submit himself to examination, or if the court finds after hearing upon notice that the bankrupt has failed without sufficient excuse to appear and submit himself to examination at the first meeting of creditors or at any meeting specially called for his examination, he shall be deemed to have waived his right to a discharge, and the court shall enter an order to that effect. (July 1, 1898, ch. 541, § 14, 30 Stat. 550; Feb. 5, 1903, ch. 487, § 4, 32 Stat. 797; June 25, 1910, ch. 412, § 6, 36 Stat. 839; May 27, 1926, ch. 406, § 6, 44 Stat. 663; June 22, 1938, ch. 575, § 1, 52 Stat. 850; May 24, 1949, ch. 139, § 130, 63 Stat. 107; July 7, 1952, ch. 579, § 6, 66 Stat.

422; Sept. 2, 1957, Pub. L. 85-275, § 1, 71 Stat. 599; July 12, 1960, Pub. L. 86-621, § l, 74 Stat. 408.)

11 U.S.C. § 35 (1964)

§ 35. Debts not affected by a discharge.

(a)[1] A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due or for maintenance or support of wife or child, or for seduction of an unmarried female, or for beach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission

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[1] So in original. There is no subdivision (b).

basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment. (July 1, 1898, ch. 541, § 17, 30 Stat. 550; Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798; Mar. 2, 1917, ch. 153, 39 Stat. 999; Jan. 7, 1922, ch. 22, 42 Stat. 354; June 22, 1938, ch. 575, § 1, 52 Stat. 851; July 12, 1960, Pub. L. 86-621, § 2, 74 Stat. 409.)

11 U.S.C. § 101

§ 101. Definitions

* * *

(32) The term "insolvent" means—

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is—

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due.

* * *

11 U.S.C. § 523

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive . . . .

* * *

No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

v.

R. SCOTT APPLING,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT

STATEMENT

The Eleventh Circuit, in an opinion by Judge William Pryor, correctly construed the phrase "statement respecting the debtor's * * * financial condition." 11 U.S.C. § 523(a)(2).

The word "respecting" is one of expansion, one that adds breadth to the object it modifies. That is how it has been used throughout American constitutional and statutory law since the Framing. Congress routinely uses such broadening terms, and the Court faithfully gives meaning to those words.

Lamar defines "financial condition" as the "balance of all of the debtor's assets and liabilities" (Pet. 19) and "one's overall financial health or status" (Br. 23). A "statement respecting financial condition" must therefore reach more than those statements that, standing alone, reveal one's *entire* financial status. Otherwise, the word "respecting" does no work.

A debtor's statement describing a *single* asset or liability has a direct impact on the *sum* of his assets and liabilities. It describes the existence or value of an item that would appear on his balance sheet or income statement. A statement describing a single asset is, accordingly, a "statement respecting his financial condition." This construction gives effect to the word "respecting," and it is appropriately bounded by the meaning of the term "financial condition."

The Eleventh Circuit's result also accords with how we ordinarily use language. If a friend announces that she just won $500,000 in the lottery, most everyone would understand that as a "statement respecting her financial condition."

Lamar contends that the phrase is limited to only those "statements providing a more holistic snapshot of one's financial status." Br. 29. But this gives "respecting" no effect. Lamar's position might have force if Congress had written a different statute, one that covered a "statement *of* financial condition."

Lamar tellingly dedicates most of its brief to the purpose, principles, and history of the Bankruptcy Code. But where, as here, the statutory language is unambiguous, the Court need not—indeed, should not—go beyond the text itself. In any event, the purpose, principles, and history of the Bankruptcy Code independently compel the Eleventh Circuit's construction.

After a debtor declares bankruptcy, a creditor may attempt to exempt debt from discharge by alleging that the debtor made a false statement. Section 523(a)(2)(B) applies if the statement is one "respecting the debtor's financial condition." Otherwise, Section (2)(A) applies.

In recognition of widespread creditor misconduct, Congress adopted certain safeguards for debtors in (2)(B): the statement must be in writing, and the creditor must prove reasonable (rather than justifiable) reliance. Lamar acknowledges (Br. 11) that Congress designed (2)(B) to "balance the scales more fairly" in favor of debtors.

It is common ground that the protections of (2)(B) apply if a debtor makes a statement describing *all* of his assets and liabilities. The question here is whether (2)(B) applies if the debtor describes *some* of his assets or liabilities. It does.

Lamar's rule to the contrary would render (2)(B)'s protections illusory. In its view, any creditor

can evade the statute's protections by structuring its questions to ask everything but "overall" financial condition. Under this logic, a creditor could also avoid (2)(B) by asking a borrower to list his assets on Monday and his debts on Tuesday. Congress used a broadening term here, as it often does, to prevent such circumvention.

Indeed, Lamar's atextual interpretation would exclude from (2)(B)'s ambit the very practice Congress designed the statute to reach. Congress observed that unscrupulous creditors would trick borrowers into providing an incomplete list of debts, later using that as a basis to deny discharge. But, under Lamar's rule, (2)(B) would not apply. Not only is our reading true to the text, but it also captures the particular practice for which (2)(B) was designed.

The Eleventh Circuit's construction also accords with real-world behavior. Creditors rely on representations borrowers make about individual assets because those statements shed light on the borrower's financial condition and thus the likelihood that the borrower will repay. In form, substance, and effect, there is often little distinction between a statement that describes the entirety of a borrower's financial condition and one that describes some important aspect of it. This case illustrates that principle.

Lamar's approach, however, rests on arbitrary line-drawing. Lamar believes that (2)(B) applies to a statement as vacuous as "Don't worry, I am above water." Br. 19. Yet it contends that statements describing substantial, concrete assets—"Don't worry, I have $100,000 of equity in my house"—are not within (2)(B)'s protections. That makes no sense.

Additionally, the Eleventh Circuit's construction properly recognizes that the statute encourages reliance on written statements. Writing enhances accuracy at the start, and it obviates the sort of guesswork that occurred below, where the bankruptcy court sought to reconstruct oral conversations that occurred a decade earlier. Given the staleness of this dispute, it is unsurprising that the court disbelieved testimony by both Appling *and* Lamar. Contradictions in Lamar's reliance theory, moreover, remain unresolved. Congress's decision to encourage writing—a policy apparent on the face of the statute—promotes fairness, accuracy, and efficiency.

The statute's lineage also compels our construction: prior to 1978, courts construed the statutory language precisely as we urge. When Congress reused the same text in the 1978 Code, it already had established meaning.

Setting all of this aside, Appling would win even under Lamar's newly announced interpretation.

A. Statutory background.

Because the "main purpose" of bankruptcy is "to aid the unfortunate debtor by giving him a fresh start in life" (*Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918)), the Bankruptcy Code contains broad discharge provisions. See, *e.g.*, 11 U.S.C. § 727. Through discharge, the debtor exchanges "the property which he owns at the time of bankruptcy" for "a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934).

But there are exceptions. Relevant here, Section 523(a)(2) bars a debtor from discharging debts "to the extent obtained by" certain kinds of fraud.

Section 523(a)(2)(A) bars discharge of debt obtained by "false pretenses, a false representation, or actual fraud, *other than* a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A) (emphasis added). A creditor's claim of nondischargeability under (2)(A) requires proof of the common-law elements of fraud, including justifiable reliance. See *Field* v. *Mans*, 516 U.S. 59, 61 (1995).

Section 523(a)(2)(B), by contrast, bars discharge of debts obtained by a fraudulent "statement" "respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(B). For a (2)(B) claim, the statement must be "in writing," "materially false," "made or published with intent to deceive," and the claimant must have "reasonably relied" on it. *Ibid.*

Sections (2)(A) and (2)(B) are mutually exclusive. See, *e.g.*, *Field*, 516 U.S. at 66; *Collier on Bankruptcy* ¶ 523.08 (16th ed. 2017); 3 *Norton Bankruptcy Law and Practice* § 57.15 (3d ed. 2017).

B. Factual background.

In the summer of 2004, respondent R. Scott Appling purchased a small manufacturing business in Hartwell, Georgia; soon after, he learned that the seller had substantially misrepresented its value. Pet. App. 21a, 47a.

Appling sought representation, first from Walter Gordon, a lawyer in Hart County. J.A. 32-34. Gordon referred Appling to petitioner Lamar, Archer & Cofrin, LLP (Lamar), an Atlanta law firm. *Ibid.* Lamar took the case, retaining Gordon as local counsel. Pet. App. 47a. Lamar estimated that the representation could "cost as much as a hundred thousand dollars." J.A. 87.

Appling paid more than $135,000 in fees. J.A. 88-90, 98-99; Bankr. Dkt. 69, at 28. By March 2005, he was no longer current with Lamar's escalating bills; he owed the firm more than $60,000, and he lacked funds to pay. Pet. App. 2a. At the same time, the case was nearing trial. On March 9, 2005, days before the pretrial hearing (J.A. 98-99), Lamar sent Appling a letter demanding payment; Lamar threatened to terminate the firm's representation if he did not pay. Pet. App. 52a.

On March 18, 2005, Appling met with Walter Gordon and Robert Lamar. What was said at this meeting (and at another meeting some months later) lies at the core of this case.

Testifying nearly a decade later during the September 2014 bankruptcy trial (J.A. 31, 111), Appling, Gordon, and Robert Lamar all recalled that, in response to Lamar's demand for payment, Appling reported that his accountant, Mike Strickland, had determined that he could amend his prior years' tax returns and request a refund. Pet. App. 22a. The parties' recollections of what was said beyond that conflict.

Appling testified that he merely relayed what his accountant had told him and that his description of the prospective refund was therefore qualified. Appling recalled saying that, per Strickland's estimate, he could "*possibly* get a hundred back" and that "Mike Strickland said that it could be *potentially* $100,000." J.A. 115 (emphasis added). In Appling's recollection, he made clear that the amount of the refund was uncertain because Strickland had not yet prepared the amended return: "at the time of that meeting, I didn't make a promise, because I couldn't

promise what I didn't know I was going to get. It hadn't been done yet." J.A. 98.

Gordon's recollection of the conversation was materially similar. Gordon recalled Appling's statement that the amount of the refund was unknown; he recounted Appling saying "that he felt like" the refund "would be approximately a hundred thousand dollars." J.A. 35. Gordon did not believe that Appling's amended return had "been prepared at that point." *Ibid.*

Robert Lamar's testimony was different. In Lamar's account, Appling told them that he "had already prepared the tax return." J.A. 54. In this version of the story, because the tax return was final, Appling stated that the amount was already known and that it would be "in excess of $100,000." J.A. 55.

Lamar was aware that the prospective tax refund was Appling's sole unencumbered asset. He and Gordon had access to all of Appling's financial information. See J.A. 43. Lamar knew at the time "the fact that there [were] no other assets there." J.A. 54-55. Because "everything" Appling owned was "tied up in the business," Lamar recounted that "there were absolutely no assets of any type available to satisfy our fees" other than the prospective refund. *Ibid.*

In June 2005, Appling filed an amended tax return requesting a $60,718 refund. Pet. App. 3a. In October 2005, the IRS issued a $59,851 refund. *Ibid.*

Appling, his wife, and Robert Lamar subsequently met in November 2005. Pet. App. 3a, 22a. As with the March meeting, the parties have "very different" "recollection[s]" of what was said. *Id.* at 57a.

Appling requested this meeting (J.A. 106) because he believed that Lamar was overbilling him (J.A. 53). Indeed, the bills nearly doubled Lamar's initial upper estimate of $100,000 (J.A. 87), and Appling had already paid more than $135,000. See J.A. 88-90, 98-99. Appling therefore tried to "negotiate" with Lamar. J.A. 114. See also J.A. 106-107 ("I asked Mr. Lamar if he would be interested in bringing the bill down."). Lamar refused, saying, "We're not going to reduce it a dollar." J.A. 107.

During this meeting, Appling testified that he "[w]ithout a doubt" informed Lamar that he had already received his tax refund. J.A. 114. But, after Lamar refused to negotiate the amount of the outstanding bill, Appling told Lamar that he would use his refund to keep his struggling business afloat. J.A. 109, 114. Appling's wife, Connie, corroborated that account. J.A. 133.

Robert Lamar recalled the conversation differently. He testified that Appling "represented to us that it had been screw[ed] up * * * and he still hadn't gotten the refund, but he expected it at any time." J.A. 57. Lamar claims that he did not learn that Appling had received his tax refund until June 2006. J.A. 58-59.

After June 2006, Lamar did nothing for six years. In 2012, Lamar sued Appling in state court. C.A. App. A113. Lamar obtained a judgment, including interest, for $104,179.60. Pet. App. 23a. Appling and his wife filed for bankruptcy three months later. *Ibid.*

C. Proceedings below.

1. Lamar followed Appling into bankruptcy and filed this adversary proceeding. Lamar sought to

have its entire $104,179.60 judgment declared non-dischargeable under Section 523(a)(2)(A). Pet. App. 23a. Lamar contended that Appling made misrepresentations about his expected tax refund during their 2005 meetings and that Lamar justifiably relied on those misrepresentations in forgoing collection between March 2005 and June 2006. *Id.* at 68a-69a.

Appling moved to dismiss for failure to state a claim. Pet. App. 67a. He asserted that, because the alleged misrepresentations were "statements respecting [his] financial condition," (2)(B)'s writing requirement applies. *Id.* at 70a-76a. Here, however, the relevant statements were oral. *Id.* at 70a.

The bankruptcy court disagreed. It reasoned that the term "statement respecting financial condition" covers only a debtor's "overall financial condition or net worth." Pet. App. 73a. Because Appling's statements about his "tax refund" described a single asset," the court held that (2)(A) governed. *Ibid.*

2. The case proceeded to trial in September 2014. Pet. App. 46a. In March 2015, the bankruptcy court made findings as to what was said during the oral conversations a decade earlier. *Id.* at 52a-60a.

The court acknowledged the difficulty of resolving what amounted to a "disagreement as to recollection." J.A. 135. As the court quipped, "most people who get on this witness stand don't have horns and pitchforks so that I can tell who the angel and who the devil is." *Ibid.* The court therefore assessed "the demeanor of the witnesses" to determine their credibility. Pet. App. 58a.[1]

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[1] Robert Lamar is a trial lawyer with more than 40 years' experience. J.A. 70. Appling, by contrast, repeatedly aggravated

The bankruptcy court addressed two issues regarding the March meeting—whether Appling had misrepresented the status of the amended return, and whether he misrepresented the amount that he anticipated receiving.

As to the first, the court agreed with Appling, disbelieving Robert Lamar. Although "Lamar testified" that Appling represented that the amended tax return had "been prepared by that time," both Appling and Gordon "testified that no such representation was made." Pet. App. 54a. Given that "Gordon ha[d] no financial interest in this litigation (and even if he did, his testimony would be adverse to that interest)," the court did not credit Lamar's testimony. *Ibid.*

As to the second issue, during trial, the bankruptcy court recognized that Appling may have "simply gotten some preliminary information from Mr. Strickland" and then accurately relayed what Strickland had told him. J.A. 134. Indeed, Appling described his prospective refund as "possibl[e]" and "potential[]" (J.A. 115), and Gordon similarly knew that the amount of the refund was then "approximate[]" (J.A. 35).

But, in its subsequent decision, the bankruptcy court did not address this possibility. The court instead concluded that it did "not believe" Appling's statements "that he honestly thought that he would receive a refund of approximately $100,000." Pet. App. 55a. The court never resolved whether, in the oral conversation a decade earlier, Appling had actu-

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the court by speaking out of turn. See, *e.g.*, J.A. 89 ("This is not your turn to just talk, and talk, and talk."); J.A. 95 ("You be quiet."); J.A. 101 ("Stop talking, Mr. Appling.").

ally made that representation—or whether Appling merely, and accurately, relayed what his accountant had told him.

Despite having rejected Robert Lamar's testimony about the March meeting, the bankruptcy court relied on his account of the November meeting. Pet. App. 55a-60a. The court found that Appling made a "false representation at the November 2005 meeting that he had not yet received the refund." *Id.* at 58a.

On the basis of these findings, the bankruptcy court concluded that Appling made oral misrepresentations as to the amount and status of his tax refund. Pet. App. 52a-60a. As to reliance, because of its "knowledge of [Appling's] financial condition," Lamar "clearly believed that the tax refund was the only source of cash [Appling] would have to pay the fees." *Id.* at 62a. The court ultimately entered judgment for Lamar pursuant to Section 523(a)(2)(A). *Id.* at 66a.

3. The district court affirmed. Pet. App. 20a-44a. It recognized that the "case turns" on the proper construction of the phrase "statement respecting a debtor's * * * financial condition." *Id.* at 26a. In that court's view, "financial condition" "connote[s] the overall net worth of an entity or individual." *Id.* at 28a (quotation omitted). It did not consider the word "respecting." *Id.* at 28a-29a. Because Appling's "statements about his tax refund involved a single asset rather than [Appling's] net worth, overall financial health, or equation of assets and liabilities," the court held that they were not statements "respecting * * * financial condition." *Id.* at 30a.

4. The Eleventh Circuit unanimously reversed. Pet. App. 1a-14a.

Appling presented three arguments to the Eleventh Circuit: *first*, that the writing requirement of (2)(B) bars Lamar's claim; *second*, that Lamar failed to prove reliance, particularly in light of the unexplained six-year delay; and, *third*, that Lamar did not prove that Appling's alleged misrepresentations caused its asserted injury. The court of appeals agreed with the first and did not reach the others.

The court held that a statement describing a single asset or debt can be a "statement respecting the debtor's ... financial condition." Pet. App. 14a. As a result, Section 523(a)(2)(B) governs this case. *Ibid.* Because the alleged misstatements were not in writing, Lamar cannot state a claim. *Ibid.*

The "text," the Eleventh Circuit concluded, "is not ambiguous." Pet. App. 12a. The court reasoned that, although "'financial condition' likely refers to the sum of all assets and liabilities," "it does not follow that the phrase 'statement *respecting* the debtor's ... financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a. The court explained that the term "respecting" is "defined broadly as '[w]ith regard or relation to; regarding; concerning.'" *Ibid.* Given this plain meaning, "a statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.*

Accordingly, when "[r]ead in context," the statutory phrase "includes a statement about a single asset." Pet. App. 8a. Holding otherwise would improperly "read the word 'respecting' out of the statute." *Ibid.*

The court observed that this statute is "perfectly sensible" because it "gives creditors an incentive to

create writings before the fact." Pet. App. 13a. It therefore "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." *Ibid.* The court concluded that the writing requirement enables the "the honest debtor" to quickly "prove his honesty" and, conversely, "the innocent creditor prove a debtor's dishonesty." *Ibid.*

Judge Rosenbaum concurred, explaining that the court's construction "better promotes congressional intent to give a fresh start to only the 'honest debtor' than does a narrow construction of the same phrase." Pet. App. 14a-19a.

SUMMARY OF ARGUMENT

I. The plain language of Section 523(a)(2) resolves the question presented. A statement that describes a debtor's assets or liabilities, either individually or in the aggregate, is a "statement respecting the debtor's * * * financial condition."

The term "respecting" has a broadening effect when used as a preposition, and the Court consistently holds that such terms have critical importance to statutory construction. This case is no different.

A debtor's "financial condition" is the aggregate of the debtor's assets and liabilities. See Pet. 19. A statement describing a single asset or debt has a direct impact on that aggregate and is, therefore, a "statement respecting financial condition." This construction gives effect to the word "respecting," and it is appropriately bounded by the term "financial condition."

Lamar, by contrast, cannot offer a construction of the statute that provides a role for the word "respecting." It focuses entirely on the term "financial condi-

tion." Lamar's strategy might have purchase if the statute said "statement *of* financial condition." But it does not.

The interpretation Lamar advances, moreover, leads to arbitrary distinctions and bizarre results. Lamar says that statements as meaningless as "Don't worry, I am above water" (Br. 19) trigger the protections of (2)(B), but statements that offer significant, concrete details about a debtor's financial status do not. Lamar's approach cannot account for implicit statements, piecemeal disclosures, or the reality of how creditors—including Lamar itself—say that they rely on borrowers' representations.

Lamar fears that, under our true-to-text construction, (2)(B) would swallow (2)(A). Not only is that wrong as a textual matter, but it is also disproven empirically: the Fourth Circuit adopted this construction 34 years ago, yet (2)(A) retains a substantial function.

Lamar tries to escape the statute's plain text with the aphorism that the Bankruptcy Code protects the "honest but unfortunate debtor." But, because the statutory language is clear, no recourse to a substantive construction canon is appropriate. Lamar's argument also disregards the structure of Section 523(a)(2), and it mistakes the applicable canons. In any event, the Eleventh Circuit concluded that our construction furthers the goal that Lamar trumpets: a written instrument "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." Pet. App. 13a.

The text should be the beginning and the end of this case.

II. The statute's lineage confirms this result. The phrase "statement respecting financial condition" dates to 1926. Between 1926 and 1978, courts repeatedly held that a statement describing a single asset or liability qualified. It was against that backdrop that Congress reenacted the same language in the current statute.

All of Lamar's talk of sledgehammers, elephants, and peeps, meanwhile, rests on an unsupported assumption that, prior to 1978, oral misstatements respecting financial condition could render debt nondischargeable. But the leading treatise indicates otherwise.

III. As Judge Pryor explained below, the statute, interpreted according to its text, is "perfectly sensible." Pet. App. 13a.

The Eleventh Circuit's construction is necessary to give effect to Congress's carefully calibrated protections for debtors. In adopting Section 523(a)(2), Congress identified an abusive practice that it sought to end: creditors would solicit lists of a borrower's liabilities only, take steps to ensure that the list was incomplete, and then later use the list as a means to prevent discharge. Lamar's approach fails to capture the very example that Congress stated was the motivation for the law. Lamar's construction, moreover, would render (2)(B) subject to ready circumvention. Adherence to the statutory text avoids these improbable results.

Additionally, Congress's adoption of a writing requirement makes underlying transactions more accurate, and it avoids saddling bankruptcy courts with the task of adjudicating the contents of oral

conversations about a debtor's financial condition that occurred years or decades earlier.

This case demonstrates the wisdom of the statutory design. In reconstructing decade-old conversations, the bankruptcy court doubted testimony from both Appling *and* Lamar. Little wonder why: it can be difficult to recall, with legal precision, the particulars of a conversation from six months ago; turning back the clock a full decade is another matter entirely. It was sensible for Congress to determine that bankruptcy courts should not be in the business of resurrecting the particulars of ten-year-old conversations about a debtor's financial condition.

IV. For the first time, Lamar now says that a statement "providing a more holistic snapshot of one's financial status" qualifies as a "statement respecting the debtor's financial condition." Br. 29. Appling prevails under that newly minted position: because Lamar's theory of reliance was that it knew *everything* about Appling's finances other than his tax refund (Pet. App. 62a), Appling's statements completed Lamar's "holistic snapshot" of Appling's "financial status."

ARGUMENT

I. A debtor's statement describing a single asset or debt is a "statement respecting the debtor's financial condition."

Interpreting the Bankruptcy Code begins "'with the language of the statute itself.'" *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). And where, as here, the language is plain, that "is also where the inquiry should end." *Ibid.*

The plain text of Section 523(a)(2)—"statement respecting the debtor's * * * financial condition"—resolves the question presented. A "statement respecting the debtor's financial condition" is a statement that has a "direct relation to, or impact on" (*Presley* v. *Etowah Cty. Comm'n*, 502 U.S. 491, 506 (1992)) "the balance of all of the debtor's assets and liabilities" (Pet. 19) or the debtor's "overall financial status" (Pet'r Br. 23).

A debtor's statement describing an individual asset or liability necessarily qualifies. Indeed, a debtor's statement describing a *single* asset or liability has a direct impact on the *sum* of his assets and liabilities, which is how Lamar defines "financial condition." Put differently, a debtor's statement that describes the existence or value of a constituent element of the debtor's balance sheet or income statement qualifies as a "statement respecting financial condition."

This construction also accords with how one ordinarily uses this language. Suppose a friend calls to say that he just won $500,000 in the lottery. One would certainly think that he made a "statement respecting his financial condition" (or, as Lamar prefers, a "statement about his financial condition"), even though he did not offer other details about his finances. If that friend proceeds to announce that recent tests show he no longer has cancer, he has made a statement "respecting" (or "about") his medical condition, even if he did not also volunteer his cholesterol level.

The plain meaning of the language that Congress used resolves this case. Lamar, by contrast, asks the Court to interpret the statutory text in a way irreconcilable with its common usage.

A. The plain text governs.

1. "Respecting" is a broadening term.

a. There is no genuine dispute as to our foundational point: the word "respecting" has a broadening effect when used as a preposition in a statute.

That conclusion stems from the definition of the term. *Webster's Third* defines "respecting" as "with regard or relation to: regarding, concerning" or "in view of: considering." *Webster's Third New International Dictionary* 1934 (3d ed. 1981). *Webster's Second* likewise defines the term as "concerning; about; regarding; in regard to; relating to." *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967).[2]

Use of the word "respecting" throughout American law leaves no doubt that it adds breadth to the object it modifies. The Establishment Clause, for example, forbids Congress from making any law "respecting an establishment of religion." U.S. Const. amend. I. This is not synonymous with a law establishing a religion; the First Congress considered and rejected a proposal that "Congress shall make no law establishing Religion." *Lee* v. *Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring). For this reason, the Constitution does "not simply prohibit the establishment of a state church or a state religion"—rather, "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971).

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[2] The meaning of "respecting" has been consistent. See, *e.g.*, 2 *The New Century Dictionary* 1537 (1946) (defining "respecting" as "regarding or concerning, or relating to"); 8 *The Oxford English Dictionary* 536 (1933) (defining "respecting" as "[w]ith reference or regard to").

The Property Clause, moreover, provides Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Court has repeatedly held that Congress's regulatory power reaches beyond public property itself; it has "approved legislation respecting the public lands '[i]f it be found to be necessary, for the protection of the public, or of intending settlers on the public lands.'" *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *Camfield* v. *United States*, 167 U.S. 518, 525 (1897)).

Section 5 of the Voting Rights Act required preclearance before certain entities enforced any new "standard, practice, or procedure *with respect to* voting." 52 U.S.C. § 10304 (emphasis added). In *Presley*, 502 U.S. at 506, the Court held that the statute governed policies that have a "direct relation to, or impact on, voting."

For its part, Lamar has repeatedly agreed that "respecting" performs a broadening function. Lamar told the court of appeals that, in view of our argument, "respecting" has an "identical effect" to the alternative terms "concerning, about, regarding, relating." Pet'r C.A. Br. 22. In its petition for certiorari, Lamar acknowledged that "it is no doubt true that 'respecting,' like the similar 'related to' or 'in connection with' phrases Congress uses from time to time, has breadth in the abstract." Pet. 20. Even now, Lamar admits that "it is true that 'respecting' *can* be 'defined broadly'" (Br. 27), and—in attempting to find a role for the word, albeit unsuccessfully—Lamar says "[r]especting broadens the scope of statements * * * that qualify" (Br. 29).

b. Despite its earlier admissions, Lamar now contends that "respecting" cannot mean "related to." Br. 26-28. Instead, Lamar plucks three other synonyms that it prefers—"about," "with reference to," or "as regards." *Ibid.* This just invites a game of dictionary hide-and-seek.

"[A]bout" means "in relation to; having regard to." *Webster's New Twentieth Century Dictionary* 5 (2d ed. 1967). Likewise, "with reference to" is defined as with "relation" to and with "regard" to. *Id.* at 1516. And "regard" means "to have relation to" or "to concern." *Id.* at 1520.

So, while Lamar now resists the notion that "respecting" here means "related to," Lamar admits that it means "about," "with reference to," or "as regards"—all of which mean "in relation to."

The distinctions that Lamar attempts to draw do not exist. Rather, Lamar got it right earlier—these terms are synonyms with "similar" (Pet. 20), if not "identical" (Pet'r C.A. Br. 22), effect.[3] The fundamental conclusion remains: "respecting" performs a broadening function.

2. The Court gives effect to broadening terms.

Congress's use of the broadening term "respecting" is critical to the statute's construction. When interpreting statutes with such language, the Court has identified two guiding principles.

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[3] This is why Lamar is wrong to contend (Br. 19, 29-30) that the Bankruptcy Code's alternative use of the similar term "relating to" creates a negative inference. The term "in relation to" means "respect." *Webster's Third New International Dictionary*, *supra*, 1916. These are all synonyms.

a. First, in recognition of the language Congress actually used, the statute's construction must take account of the term of breadth.

Take the Court's decision in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The Court addressed the Airline Deregulation Act (ADA), which had a preemption clause forbidding states from enforcing any law "relating to rates, routes, or services of any air carrier." *Id.* at 383. The question was whether this law preempted states from regulating airline advertising. *Id.* at 379-380.

The states argued that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." *Morales*, 504 U.S. at 385. The Court rejected that construction because it "simply reads the words 'relating to' out of the statute." *Ibid.* In that statute, "the key phrase, obviously, is 'relating to.'" *Id.* at 383.

The Court instead held that the ADA preempts any state law that has "a significant impact upon" airlines rates. *Morales*, 504 U.S. at 389, 390. Of course, not everything can be said to relate to airline rates: if the connection is "too tenuous, remote, or peripheral," then a law does not "relate to" airline rates, and there is no preemption. *Id.* at 388, 390. See also *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428 (2014); *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008).

Morales borrowed from the Court's ERISA jurisprudence, where "[t]he phrase 'relate to' was given its broad common-sense meaning." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987). Last Term, construing the Federal Employees Health Benefits Act, the Court explained that "Congress characteristically

employs" "the expansive phrase 'relate to'" in order "to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1197 (2017).

The Court has repeatedly recognized that broadening terms must have an effect on statutory construction. Because "respecting" is a well-recognized broadening term, the proper construction cannot "simply read[]" this "key" term out of the statute. *Morales*, 504 U.S. at 383, 385.

b. At the same time, the Court recognizes the importance of limiting principles. When statutes use such broadening words, the party seeking the narrower construction will invariably raise the slippery-slope specter (see Pet'r Br. 18, 31, 46)—that, if the terms were "extended to the furthest stretch of their indeterminacy," then the statutory relationships could be said to "stop nowhere." *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1990 (2015) (quotation and alteration omitted).

The answer to that concern, the Court has instructed, is not to disregard the broadening term altogether. See *Morales*, 504 U.S. at 383, 385. No, the solution is that the Court must give effect to the broadening term while simultaneously identifying "a limiting principle consistent with the structure of the statute and its other provisions." *Maracich* v. *Spears*, 570 U.S. 48, 60 (2013).

The Court's decision in *Travelers Indemnity Co.* v. *Bailey*, 557 U.S. 137 (2009), is illustrative. See Pet'r Br. 31. The Court there considered the language "based upon, arising out of or relating to." 557 U.S. at 149. That a "curbstone philosopher" could as-

sert that "everything is related to everything else" was no license to disregard that language. *Ibid.* Rather, it supported the far more modest conclusion that "[t]here is, of course, a cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd." *Ibid.* See also *Morales*, 504 U.S. at 388, 390.

3. The phrase as a whole compels the Eleventh Circuit's construction.

The Court's balanced approach to such terms of breadth yields a sensible result to the question presented: a statement that describes a debtor's assets or debts, either individually or in the aggregate, qualifies as a "statement respecting the debtor's financial condition." See Pet. App. 8a-9a. Our construction is faithful to Congress's use of the broadening term "respecting," and it employs "financial condition" as a limiting principle.

a. The phrase has three main components: (i) "statement," (ii) "respecting," and (iii) "financial condition." We consider these terms individually and then together as a whole.

i. Used here, "statement" has its plain meaning: "that which is stated; an embodiment in words of facts or opinions; a narrative; recital; report; account." Pet. App. 10a (quoting *Webster's New International Dictionary* 2461 (2d ed. 1961)).

Lamar does not now disagree.[4] And there is no reason to read the word "statement" any other way.

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[4] Below, Lamar identified scattered uses of "financial statement" in the legislative history. Pet'r C.A. Br. 15-17. But, because Congress did not use the term "financial statement" in

Elsewhere in the Bankruptcy Code, Congress specified certain kinds of statements, like a "disclosure statement (11 U.S.C. § 1125) and a "registration statement" (*id.* § 101(49)(A)(xii)). But *this* statute uses the term "statement;" it would be error, therefore, to "limit the definition" to a specific kind of statement, like a "financial statement[]." Pet. App. 10a.

Additionally, because "it is hard to imagine an oral recitation of all assets and liabilities," "a formal financial statement is almost always a written document." Pet. App. 10a-11a. Therefore, "reading the statute to cover only financial statements would render the writing requirement surplusage." *Id.* at 11a.

ii. As we have described, the preposition "respecting" has a broadening effect. From the Establishment Clause to the Voting Rights Act, the Court has consistently embraced that result. See pp. 18-19, *supra*.

When Congress does not intend for a broadening effect, it has alternative language at its disposal—including "of." Pet. App. 9a. Elsewhere in the Bankruptcy Code, Congress used various "statement of" phrases.[5] And, throughout federal law, Congress uses the phrase "statement *of* financial condition" when it intends for a narrower result.[6] But Congress did

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the statutory text, this "argument works against" Lamar. Pet. App. 10a. Lamar has since abandoned this contention. Indeed, the legislative history often used "statement" alone. See, *e.g.*, S. Rep. No. 95-989, at 78 (1978).

[5] See, *e.g.*, 11 U.S.C. § 329(a) ("statement of the compensation paid"); *id.* § 521(a)(1)(B)(iii) ("statement of the debtor's financial affairs"); *id.* § 707(b)(2)(C) ("statement of the debtor's current monthly income").

[6] See, *e.g.*, 8 U.S.C. § 1330(b)(3)(iii)(D) ("The Attorney General shall prepare and submit annually to the Congress statements

not use that language here. Congress's use of a broadening term must be understood as intentional. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

iii. As to "financial condition," the Eleventh Circuit (Pet. App. 7a-8a) looked to the Code's definition of the term "insolvent," which is, in relevant part, the "financial condition such that the sum of such entity's debts is greater than all of such entity's property." 11 U.S.C. § 101(32)(A). It concluded that "'financial condition' likely refers to the sum of all assets and liabilities." Pet. App. 8a.

Earlier, Lamar offered materially the same formulation: "financial condition," it said, is "the balance of all of the debtor's assets and liabilities." Pet. 19. Lamar now defines "financial condition" as, similarly, "one's overall financial status," which remains the sum total of one's assets and debts. Br. 23. See also Br. 24-27.

b. The whole phrase read together answers the question presented: a "statement respecting the debtor's financial condition" is a statement that has a "direct relation to, or impact on" (*Presley*, 502 U.S. at 506) "the balance of all of the debtor's assets and liabilities" (Pet. 19) or the debtor's "overall financial status" (Pet'r Br. 23).

This necessarily includes statements a debtor makes describing his assets or debts, either individually or in the aggregate. Under Lamar's own definition, "financial condition" is "the balance of all of the debtor's assets and liabilities." Pet. 19. A debtor's

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of financial condition of the Immigration Enforcement Account"); 12 U.S.C. § 4707(f)(1)(B) ("a statement of financial condition"); 31 U.S.C. § 5134(d)(2) ("Statements of the financial condition of the Fund").

statement describing a *single* asset or liability has a direct impact on the *sum* of his assets and liabilities.[7]

Put differently, a debtor's statement describing the existence or value of a constituent element of his balance sheet or income statement qualifies as a "statement respecting his financial condition."[8]

Lamar offers two principal rejoinders: *first*, that this result does not give "financial condition" its due (Br. 26-29), and *second*, that there is no limiting principle because "everything is related to everything else" (*id.* at 30-33). Both are mistaken for the same reason—our construction is bounded by the term "financial condition."

We, like the Eleventh Circuit, assume Lamar's definition of "financial condition." Lamar cannot, therefore, assert that we have improperly defined the term.

Lamar says that, as we interpret the statute, its meaning is similar to other hypothetical texts, such as a "statement respecting the debtor's *assets or liabilities*." Br. 26, 29. But Lamar's observation is merely that there are different ways to write statutory language that yield similar meaning. That is *always* true.

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[7] This result accords with *Field*, which indicated that a statement about a "bank balance" qualifies as a "statement respecting financial condition." See 516 U.S. at 76. A "bank balance" is, of course, a single asset.

[8] For a creditor to bring any claim under Section 523(a)(2), the creditor must prove that the alleged misstatement was material. See *Field*, 516 U.S. at 67-69 (describing materiality for (2)(A)); 11 U.S.C. § 523(a)(2)(B)(i) (requiring a "materially false" statement).

The correct question is whether our construction gives the whole of the text, including the term "financial condition," its due. Our construction does; it is tethered entirely to "financial condition." Only those statements that have a direct relation to or direct impact on "the balance of all of the debtor's assets and liabilities" (Pet. 19) or "one's overall financial status" (Pet'r Br. 23) will qualify. Many kinds of statements do not have such a direct impact; we provide several examples below. See pp. 33-35, *infra*. Far from "render[ing] Congress's use of 'financial condition' largely meaningless" (Pet'r Br. 26), our construction is bounded by it.

Lamar's slippery-slope contention (Br. 31-33) fails for this same reason. Lamar frets that our construction might cover a lie about one's "ability to make money." Br. 32. Consider a debtor's statement that she is a licensed architect. See p. 34 n.10, *infra*. That statement has no *direct* impact on her "overall financial status" or the "balance of all of her assets and liabilities." It is *not* a statement that describes an item on her balance sheet or income statement. Any arguable bearing that statement may have to her "financial condition" is decidedly *in*direct.

Our construction gives meaning to both "respecting" and "financial condition." The term "respecting" serves its broadening function, while the ultimate touchstone remains "financial condition."[9]

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[9] The Federal Debt Collection Procedures Act authorizes the government, when collecting on debts, to obtain "discovery regarding the financial condition of the debtor." 28 U.S.C. § 3015(a). It would be odd if that statute limited the government to only those documents that, standing alone, reveal the *entirety* of a debtor's financial condition. Courts routinely authorize

4. Lamar cannot account for the term "respecting"—and its position yields bizarre and arbitrary results.

a. Lamar has not and cannot offer a construction of the statutory text that gives meaning to the word "respecting."

It is revealing that Lamar has abandoned the courts of appeals that reached the result it favors. The petition for certiorari was built on *In re Bandi*, 683 F.3d 671 (5th Cir. 2012), and *In re Joelson*, 427 F.3d 700 (10th Cir. 2005). See Pet. 10-14. Having reached the merits, Lamar does not cite either decision. Not even once. Lamar's tactic is perhaps unsurprising, as neither court considered the word "respecting."

Nor can Lamar account for the word. In the court of appeals, Lamar opened its argument with legislative history. Pet'r C.A. Br. 15-17. Lamar chided our "focus on 'respecting'" as "nothing more than a game of semantics." *Id.* at 22.

The same was true in the petition. Rather than give effect to "respecting," Lamar said that the Eleventh Circuit's construction used "respecting" in a way that "change[d] the meaning of 'financial condition.'" Pet. 20. But that argument was difficult to understand, because *of course* one word in a phrase may change what another word means when standing alone. That is why words must be interpreted together, not in isolation.

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the government to obtain information that describes individual assets. See, *e.g.*, *United States* v. *Thomas*, 165 F. Supp. 3d 992, 994, 996 (D. Colo. 2015); *United States* v. *Law*, 2011 WL 2945815, at *3 (D. Idaho 2011) (report and recommendation), *adopted by* 2011 WL 2970980 (D. Idaho 2011).

Now, on the merits, Lamar offers a brief passage as to what work "respecting" could do: we are told that "'[r]especting' broadens the scope of statements about one's overall financial status or health that qualify beyond a classic financial statement or balance sheet." Br. 29. In Lamar's view, the phrase covers statements like "I am in good financial shape" (*id.* at 28) and "Don't worry, I am above water" (*id.* at 19).

Although we are heartened to see Lamar acknowledge that "respecting" must "broaden[] the scope" of the statute (Br. 29), its construction is wrong because "respecting" does no work. Lamar contrasts its supposedly "broaden[ed]" construction with "a classic financial statement." *Ibid.* But Lamar does not argue that the term "statement," as used here, means a "classic financial statement." Nor does Lamar argue that "financial condition," as used here, implies a "classic financial statement." See Pet'r Br. 23 (defining "financial condition" as "one's overall financial health or status").

Lamar's use of a "classic financial statement" as a foil is thus a straw man. Because nothing in the statutory text is limited to that concept, the word "respecting" does no "broaden[ing]" work (Br. 29) to extend the statute's reach beyond a "classic financial statement."

Lamar's articulation of what appears to be its preferred construction proves our point. Lamar says that the statutory phrase covers "any number of * * * statements providing a more holistic snapshot of one's financial status." Br. 29. But a "more holistic snapshot of one's financial status" is the same thing as "one's overall financial health or status," which is how Lamar defines "financial condition." Br. 23. Un-

der Lamar's construction, therefore, the meaning of "financial condition" does everything—and the word "respecting" does nothing at all.

b. Lamar's position, if adopted, would also create bizarre results that conflict with real-world behavior.

The question here is the range of statements to which the debtor protections in (2)(B) attach. In Lamar's view, statements as vacuous as "Don't worry, I am above water" (Br. 19) and "I am in good financial shape" (Br. 28) *do* qualify, while statements that describe concrete assets—like a specific tax refund—do not.

The Fifth Circuit, where Lamar's rule governs, illustrates this result. There, a debtor's statement describing "a commercial building, a condominium development, and a residence," as well as his provision of a list of accounts receivable, did not together qualify as a statement respecting financial condition—and thus did not trigger the debtor protections in (2)(B). *In re Bandi*, 683 F.3d at 673, 678. But that same court recently held that conclusory statements describing a company as being in "very fine legally financial shape" and having "plenty of cash to operate" *were* statements respecting financial condition. *In re Haler*, 708 F. App'x 836, 838 (5th Cir. 2017).

These flimsy distinctions reveal at least three shortcomings to Lamar's position: Lamar fails to address implicit representations, Lamar cannot account for piecemeal disclosures, and Lamar ignores the reality of how creditors actually behave.

Suppose a prospective creditor asks a potential borrower "are you solvent?" If the borrower says "yes," then Lamar believes that (2)(B) applies. So too if the borrower says "yes, because I own $100,000

worth of gold bars." But what if the borrower answers that question by saying, simply, "I own $100,000 worth of gold bars." Is that a statement about a single asset—or, given the question, is it an implicit statement about solvency?

If it *is* a statement respecting financial condition, then Lamar's rule does just what Lamar decries—"it introduces an additional, subjective layer to the inquiry." Pet'r Br. 46. And such a rule, Lamar recognizes (*ibid.*), is unmanageable. If it is *not* a statement respecting financial condition, then Lamar makes a formalistic distinction that disregards what both the borrower and creditor may have understood was the content of the communication.

Further suppose that, over time, a creditor has come to know *everything* about the borrower's financial condition—every nook and cranny—*except* the value of the borrower's holding in gold bars. With that history, is the borrower's statement "I own $100,000 worth of gold bars" a "statement respecting financial condition" when it *completes* the creditor's understanding of the borrower's "overall financial health or status"? Lamar does not say.

But that is this case. Robert Lamar testified that, at the time Appling made the statements about his tax refund, Lamar knew "the fact that there [were] no other assets there" because "everything" Appling owned was "tied up in the business." J.A. 54-55. Lamar was therefore aware that, in his own words, "there were absolutely no assets of any type available to satisfy our fees," other than the tax refund. *Ibid.* This was the linchpin of Lamar's materiality and reliance theories—Lamar "clearly believed that the tax refund was the only source of cash [Appling] would have to pay the fees." Pet. App. 62a.

If multiple disclosures that, when taken together, reveal a debtor's "overall financial health or status" qualify as a "statement respecting the debtor's financial condition," then Appling wins. If such disclosures do not qualify, then Lamar's rule is all form and no substance. It is a rule that any devious creditor can skirt at will by staging its requests for information. A creditor could avoid (2)(B) by asking a borrower to list his assets on Monday and his debts on Tuesday.

What these examples demonstrate is that creditors rely on statements describing *some* of the borrower's assets or liabilities for the same reason that they rely on statements describing *all* of the borrower's assets or liabilities. Creditors may believe that the information is material to whether the borrower's financial condition is such that she is likely to repay. That is *exactly* why Lamar says it relied on Appling's statements here. Pet. App. 62a.

The Fifth Circuit's decision in *Bandi* exemplifies this contradiction in Lamar's approach: while the court held that the debtors' statements about several of their assets did not describe their "overall financial condition and consequent ability to pay" (683 F.3d at 678-679), the court simultaneously held that the creditor was justified in relying on these statements when extending credit (*id.* at 679). Both points cannot be true. The creditor relied precisely because he thought the information *did* bear on the borrowers' ability to repay.

c. Lamar's position, moreover, lacks internal consistency.

Lamar's rule appears to require a statement that reveals "one's overall financial status or health." Br.

29. Yet, at the same time, Lamar says (Br. 28) that a representation about "net monthly cash flow" qualifies. This kind of statement, however, shows at most only changes to one's net worth; it says nothing about *preexisting* assets or liabilities. This sort of statement does not even reveal whether one has a positive net worth and thus does not describe "one's *overall* financial status." Lamar offers no unifying logic as to how this example fits within its approach.

Lamar raises yet more questions by contending that its construction covers "statements providing a more holistic snapshot of one's financial status." Br. 29. Lamar does not explain what work it intends for the word "more" to do. If Lamar means to say that a *partial* disclosure of overall financial status may qualify, then it has given up the game—because that is our position. In our view, statements about single assets, multiple assets, or all assets qualify.

Indeed, if Lamar's view is that some partial disclosures qualify, then it has contradicted its own theory that the statute is limited to statements revealing "overall financial status or health." Br. 29. And Lamar has certainly not offered any objective standard that would allow a court to determine when, in Lamar's view, a statement is sufficiently "holistic" so as to trigger (2)(B).

Lamar's approach, accordingly, rests on arbitrary distinctions and disregards actual behavior. These problems are avoided by adherence to the statute's text.

B. Lamar disregards three decades of Fourth Circuit experience.

Lamar asserts that "[t]he Eleventh Circuit's interpretation gives the 'other than' carve-out an im-

plausibly broad reach" and that, under our rule, "little will be left to be covered by Section 523(a)(2)(A)'s general rule." Br. 31-33. See also Br. 46-47.

Hard evidence disproves this conjecture. The construction we advocate has been the law in the Fourth Circuit for 34 years. See *Engler* v. *Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984). And, contrary to Lamar's supposition, (2)(A) has a substantial function there.

Section 523(a)(2)(A) regularly applies to bar a discharge when an individual misstates skills or qualifications.[10] It governs misstatements about professional licensing,[11] as well as the intended use of borrowed funds.[12] And (2)(A) bars discharges when a

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[10] See, *e.g.*, *In re Pleasants*, 219 F.3d 372, 374 (4th Cir. 2000) (debtor "[mis]represented that he was an architect who was educated at the University of Virginia School of Architecture"); *In re Foster*, 2013 WL 4590645, at *5 (Bankr. D. Md. 2013) (debtor lied about his "skill, experience and qualifications").

[11] See, *e.g.*, *In re White*, 128 F. App'x 994, 999 (4th Cir. 2005) (misrepresentations about the debtor's sales license); *Fralick* v. *Hasenberg*, 2006 WL 2390289, at *2 (D. Md. 2006) (contractor's license); *Morlang* v. *Cox*, 222 B.R. 83, 84 (W.D. Va. 1998) (business license); *In re Rixham*, 578 B.R. 287, 310-311 (Bankr. D. Md. 2017) (contractor's license); *In re Butler*, 2012 WL 6106586, at *10 (Bankr. W.D.N.C. 2012) (sales license).

[12] See, *e.g.*, *Johnson* v. *Dowling*, 2013 WL 684681, at *6 (W.D. Va. 2013) (debtor stated "he intended to use the loan proceeds to make a down payment on a parcel of land" but instead used the loan to pay other debts); *In re Simone*, 509 B.R. 6, 8 (Bankr. D. Md. 2014) (debtors stated they would use the loan "to close a valuable real estate deal" but instead used it to "live a lavish lifestyle").

debtor falsely promises that he will convey an ownership interest to his creditors.[13]

These broad categories of fraud just scratch the surface of (2)(A)'s reach. It also applies in the context of:

- A misrepresentation about the scope of repairs a debtor made to a houseboat. *In re Loignon*, 308 B.R. 243, 248 (Bankr. M.D.N.C. 2004).
- A scheme that lured in customers via the false pretenses of providing them a free gift for listening to a presentation about soap. *In re Fravel*, 143 B.R. 1001, 1000-1011 (Bankr. E.D. Va. 1992).
- A contractor who padded his bills by misrepresenting the cost of materials. *In re Brush*, 460 B.R. 448, 456 (Bankr. D.S.C. 2011).

In sum, (2)(A) is alive and well in the Fourth Circuit.

If our approach actually created "line[]" "drawing" problems (Pet'r Br. 32)—or took "a huge bite out of" (2)(A) (*id.* at 33)—Lamar or its *amicus* would have identified evidence proving as much by now. They have not. Three decades of Fourth Circuit experience confirm that the rule we advance is administrable and that (2)(A) retains a significant function.

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[13] See, *e.g.*, *In re Dovan*, 2015 WL 10437756, at *7 (Bankr. M.D.N.C. 2015) (debtor "falsely and continuously represented" that the creditor "was an owner"); *In re Mona*, 2013 WL 4017126, at *8 (Bankr. D. Md. 2013) (debtor promised to make the creditor a partner but had no intention of doing so).

C. The statutory text undermines Lamar's "honest debtor" maxim.

Lamar asserts—ten times, see Pet'r Br. 2, 5, 7, 19, 34, 35, 36, 38, 45, 47—that bankruptcy's purpose is to protect the "honest but unfortunate debtor." This hoary phrase does not permit the atextual construction that Lamar seeks.

The statute's text alone requires rejection of Lamar's argument. Because "the text is not ambiguous" (Pet. App. 12a), Lamar's attempted refuge in a supposed substantive canon of construction is unavailing. That is to say, a "distaste for dishonest debtors does not empower judges to disregard the text of a statute." *Ibid.* See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 57 (2012) ("[P]urpose * * * cannot be used to contradict text or to supplement it."). Regardless, Lamar's contention fails on its own terms.

1. Beyond the meaning of the word "respecting," Section 523(a)(2)'s structure fatally undermines Lamar's argument. The statute is designed so that a certain kind of dishonestly obtained debt *is* discharged in bankruptcy—those debts incurred by *oral* misstatements "respecting the debtor's financial condition." Lamar does not disagree. See Br. 30-31.

There are "perfectly sensible" reasons for this congressional judgment (see Pet. App. 13a-14a), on which we will later elaborate (see pp. 48-57, *infra*). But, for present purposes, it suffices to say that this is inescapably the statute that Congress wrote.

Because *this* particular statute manifestly permits discharge of debts incurred by a specific kind of dishonest conduct, Lamar's generic anti-dishonesty principle sheds no light on its proper construction.

When construing a statute to achieve its purpose, "the purpose must be derived from the text, not from extrinsic sources such as * * * an assumption about the legal drafter's desires." Scalia & Garner, *supra*, 56.

2. Lamar's effort to elevate this judicial aphorism to rule of statutory construction, moreover, is misguided. Lamar's premise (Br. 34-36) is that Congress wrote the 1978 Bankruptcy Code with knowledge that, in earlier cases, the Court had observed that bankruptcy law generally protects the "honest but unfortunate debtor." From there, Lamar concludes that this adage has become a substantive rule of construction governing the whole of the Bankruptcy Code.

But that is not the lesson to infer from the 1978 Bankruptcy Code. One need look no farther than Section 523(a)(2). Congress heightened the reliance requirement (from justifiable to reasonable) in (2)(B), the effect of which is to make it harder for creditors to prevail on certain kinds of fraud claims. See *Field*, 516 U.S. at 66-67. Even Lamar recognizes that the 1978 Code "balance[d] the scales more fairly" in favor of *debtors*. Pet'r Br. 11 (quoting H.R. Rep. No. 95-595, at 131, 1978 U.S.C.C.A.N. 5963, 6092 (1977)).

Lamar's argument thus rests on the improbable conclusion that, while enacting express, textual provisions to *protect* allegedly dishonest debtors, Congress simultaneously—yet silently—adopted a rule of construction that obligates courts to reflexively disfavor debtors accused of dishonesty when construing that same provision. Lamar has no evidence that Congress intended for this unlikely result.

And the Court surely has no interest in embracing Lamar's reasoning—that today's dictum, by virtue of congressional silence, will become tomorrow's substantive canon of construction.

It is no surprise, therefore, that the Court does not use this supposed interpretative tool. And that is not for lack of opportunity. Recently, in *Husky International Electronics* v. *Ritz*, 136 S. Ct. 1581 (2016), and earlier in *Field*, 516 U.S. 59, the Court construed the scope of Section 523(a)(2)(A). Far from embracing Lamar's theory that a distaste for the allegedly dishonest must guide the statute's construction, the Court said nary a word about honesty.

The best Lamar can do is point (Br. 4) to *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991). But *Grogan* just identified this principle as a reason to reject a debtor's countervailing "fresh start" argument—not as a stand-alone tool of statutory interpretation.

In sum, Lamar invokes the sort of "abstract[]" statement of purpose that, if accepted, would license courts to substitute their judgment for that of the legislature. Scalia & Garner, *supra*, 57. But "[s]uch a highly generalized purpose is not relevant to genuine textual interpretation." *Ibid.*

3. Lamar's argument is also wrong because it conflicts with an oft-applied canon. The Court has repeatedly invoked "the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915)). See also *Bullock* v. *BankChampaign, N.A.*, 569 U.S. 267, 275 (2013) (adopting a construction that "is consistent with the longstanding principle that 'exceptions to discharge

should be confined to those plainly expressed'"). To the extent there is any doubt about the reach of Section 523(a)(2), the Court should construe it narrowly.

The clarity of the statutory language obviates the need for these interpretative tools. But, if recourse to any canon is proper, it should be to the one that the Court routinely uses.

4. Lamar is wrong, moreover, to assume that its construction of the statute furthers the end of distinguishing sinner from saint. As this case exemplifies, saddling a bankruptcy court with the task of adjudicating the contents of alleged oral statements describing individual assets or liabilities—statements often made years or decades earlier—is unlikely to yield accurate results. It is only likely to bedevil bankruptcy courts with intractable disputes, often animated by grudge more than rational judgment. This case is illustrative: the bankruptcy court disbelieved crucial parts of Robert Lamar's own testimony, and contradictions in Lamar's reliance theory remain unresolved. See pp. 56-57, *infra*.

Congress's writing requirement produces fair results for debtors and creditors alike: the dishonest debtor is immediately hoisted onto her own misstatements, while the resentful creditor is barred from constructing a new theory of reliance years after the fact, based on nothing more than his say-so. The writing requirement thus "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." Pet. App. 13a.

5. The issue presented here has no bearing on the several other provisions in the Bankruptcy Code that police dishonesty. Section 523(a)(4), for example, exempts from discharge any debt "for fraud or defal-

cation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Section 523(a)(6) exempts debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" (*id.* § 523(a)(6)), which applies to many fraud claims. 3 *Norton Bankruptcy Law and Practice.* § 57:15 (3d ed. 2017). And Section 523(a)(19) exempts from discharge judgments obtained in securities fraud cases.

It is "inevitable" and "unavoidable" that Section 523(a)(2) "overlap[s]" with these other provisions. *Husky Int'l*, 136 S. Ct. at 1588. Construing Section 523(a)(2) consistent with its text not only leaves that exemption a powerful tool for creditors (as the Fourth Circuit's experience proves), but it also says nothing about these other provisions in the Bankruptcy Code that exempt often-overlapping dishonest conduct from discharge.

II. Section 523(a)(2)'s lineage confirms the Eleventh Circuit's construction.

Prior to the Code's adoption in 1978, courts uniformly construed the same material language as encompassing statements about single assets and liabilities. When Congress enacted Section 523(a)(2), the meaning of the language it used was settled.

1. Section 17(a)(2) of the Bankruptcy Act of 1898 (30 Stat. 544, 550) was the original "antecedent[]" to present-day Section 523(a)(2)(A). *Field*, 516 U.S. at 64-65. As amended in 1903, it exempted from discharge "debts" that "are liabilities for obtaining property by false pretenses or false representations." Pub. L. No. 57-62, 32 Stat. 797, 798.

In 1903, Congress added Section 14(b)(3), which denied discharge in its entirety to one who "obtained

property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." 32 Stat. at 797-798.

Courts concluded that, because of the "made to" language, a borrower's misstatements to a credit rating agency did not trigger Section 14(b)(3). See *In re Russell*, 176 F. 253, 258 (2d Cir. 1910). Courts adhered to this result following a minor 1910 amendment. See *J.W. Ould Co.* v. *Davis*, 246 F. 228, 231 (4th Cir. 1917); *In re Zoffer*, 211 F. 936, 937-938 (2d Cir. 1914).

2. In 1926, Congress amended Section 14(b)(3) to bar discharge entirely to a debtor who had "[o]btained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition." Act of May 27, 1926, § 6, 44 Stat. 662, 663.

As Lamar contends (Br. 8-9), this amendment captured misstatements borrowers made to credit-rating agencies. Congress achieved this end by substituting the "made to" phrase with expansive, alternative language. But Lamar is wrong to assert (Br. 37-38, 42-43) that the language at issue here—"a materially false statement in writing respecting his financial condition"—accomplished that end. Earlier drafts of the 1926 Amendment, specifically designed "to hit the case of a man who gives a statement to Dun's or Bradstreet's," did not contain this phrase. *Hearing on H.R. Res. 353*, 68th Cong. 45 (1925) (statement of Joseph B. Jacobs).

In all events, courts uniformly held that the 1926 Act encompassed statements about individual assets or debts.

In *Albinak* v. *Kuhn*, 149 F.2d 108, 109 (6th Cir. 1945), a debtor had purported to assign accounts receivable to a creditor, but the amounts were not in fact due. The debtor contended "that these assignments * * * do not constitute a financial statement" because, in the debtor's view, "a financial statement is a term of art and purports to be a complete statement of assets and liabilities by which the precise financial worth of the person making the statement can be determined." *Id.* at 110.

The Sixth Circuit found the debtor's position "tenuous" because "the statute does not use the phrase 'financial statement.'" *Ibid.* And "[n]o cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities." *Ibid.* The court indicated that "a written statement listing as assets accounts which have no existence whatsoever, running into many thousands of dollars and including practically all of the receivables of the assignor" was, in fact, a "statement[] respecting the maker's financial condition." *Ibid.* Although the court concluded that the debtor's warrant of solvency necessarily qualified as a statement respecting financial condition (*ibid.*), the court's reasoning confirms our construction. *Albinak*, moreover, is consistent with every other case of which we are aware.

In *Mau* v. *Sampsell*, the Ninth Circuit considered facts analogous to those here. 185 F.2d 400 (9th Cir. 1950) (per curiam). A debtor addressed a letter to his creditor, stating that an existing escrow would soon

net him cash in excess of the debt; the debtor requested an extension of credit until the escrow money was released. *Id.* at 400. In fact, no escrow existed. *Ibid.* The court affirmed that this was a "fraudulent report of [the debtor's] financial status," triggering Section 14. *Ibid.*

Later, the Ninth Circuit concluded that implicit statements that the debtor "had some ownership or control of property * * * available for hypothecation by him[] amounts to a statement 'respecting his financial condition.'" *Scott* v. *Smith*, 232 F.2d 188, 190 (9th Cir. 1956). See also *In re Freudman*, 130 F. Supp. 701, 703 (S.D.N.Y. 1954), *aff'd*, 222 F.2d 369 (2d Cir. 1955) (same).

Similarly, in *In re Weiner*, 103 F.2d 421 (2d Cir. 1939), the debtor falsely represented that it held a valuable claim, and it assigned that asset to a creditor. *Id.* at 422. The Second Circuit held that this misrepresentation about "an asset" qualified as "a materially false statement by the bankrupt 'in writing respecting his financial condition.'" *Id.* at 423.

3. In 1960, Congress further amended the statute. Congress limited Section 14, which remained a complete bar to bankruptcy discharge, to business debtors. See Pub. L. No. 86-622, 74 Stat. 408, 408 (1960). As to all others, the new Section 17(a)(2) provided an exemption from discharge for debts that:

> are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting [the debtor's] financial condition made or published or caused to be

> made or published in any manner whatsoever with intent to deceive.

Id. at 409. As a result, false statements respecting financial condition, save for certain business debtors, no longer served as a *complete* bar to discharge.

After the 1960 Amendments, courts interpreted the phrase "statement in writing respecting [the debtor's] financial condition" in both the business and non-business provisions to encompass statements describing a single asset or debt.

In *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356 (9th Cir. 1977) (per curiam), the debtors falsely "represented to the Bank that they were the owners of property located at 3755 Diamond Head Circle." *Id.* at 1357. This was, the court held, "a false statement in writing respecting their financial condition." *Id.* at 1356.

Lamar says that *Tenn* did not "actually engage with the issue." Br. 44. Not so: the Ninth Circuit's holding on this point was necessary to its conclusion. 549 F.2d at 1357. That the court did not undertake an extensive discussion underscores that the conclusion was both obvious and noncontroversial.

Construing Section 14, the Eighth Circuit held that "[a] written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation." *Shainman* v. *Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967). The court reasoned that "[t]here is nothing in the language or legislative history of this section of the Act to indicate that it was intended to apply only to complete financial statements in the accounting sense." *Ibid.*

Courts held similarly for statements regarding other assets of a corporation, including false invoices. See, *e.g.*, *In re Simard*, 254 F. Supp. 609, 613 (W.D. Ark. 1966) ("[A] fraudulent invoice is not a financial statement, but is a false statement respecting the financial condition of the bankrupt."); *In re Salzman*, 61 B.R. 878, 887 (Bankr. S.D.N.Y. 1986) ("There is no question that an assigned fraudulent invoice is a materially false statement in writing respecting the financial condition of the assignor.").

The same was true for statements describing accounts receivable. See, *e.g.*, *In re Butler*, 425 F.2d 47, 49 (3d Cir. 1970) (holding that a corporation's false statements as to select accounts receivable qualified as "statements * * * respecting * * * financial condition"); *In re Lurie*, 385 F. Supp. 784, 793 (E.D.N.Y. 1974) (same); *In re Bernfeld*, 247 F. Supp. 89, 95 (E.D.N.Y. 1965) (same).

With Section 17, courts held that "[t]he bankruptcy act does not speak of a 'financial statement' in the sense of a formal listing and detailing of assets and liabilities." *Dial Fin. Co.* v. *Duthu*, 188 So. 2d 151, 154 (La. Ct. App. 1966). "Insofar as concerns the Federal Bankruptcy Act a 'statement in writing respecting his financial condition' means any written reference to the assets or liabilities of the debtor." *Ibid.* That a statement describing an asset or debt "is not a part of a complete listing of assets and liabilities is immaterial." *Ibid.*

4. When Congress enacted the present-day Section 523(a)(2) in 1978, it used the same material language—"statement respecting the debtor's financial condition."

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). "The Court has followed" this ratification "rule with particular care in construing the scope of bankruptcy codifications." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

This principle applies when Congress acts in accord with uniform lower court holdings, as it did here. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015); Scalia & Garner, *supra*, 322 ("If a word or phrase has been * * * given a uniform interpretation by inferior courts * * * , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.").

Because Congress reused language in 1978 that had by then acquired a settled meaning, Congress is presumed to have adopted that interpretation.

Against all this, Lamar claims that "the vast majority of cases" applying the earlier language "involved similar financial statements describing the borrower's *overall* financial health." Br. 43 & n.5. That is possibly true, but it is certainly irrelevant. Everyone agrees that statements describing a debtor's "*overall* financial health" are within the meaning of the phrase. Not one of Lamar's cases says that statements describing single assets or liabilities do not qualify. Nor has Lamar identified any case, ... less a plurality of cases, so as to call our conclusion into doubt.

Apparently recognizing that it cannot explain these cases away, Lamar says—without explanation—"that some courts may have erred in construing the phrase." Br. 45. That misses the point. Our main argument is not that these cases are persuasive for how they construed the law, although they are useful on that score, too. We cite these cases principally for the fact of their holding; they demonstrate that the phrase "statement respecting financial condition" had an established meaning when Congress reused it in 1978.

5. Lamar has one last argument: Lamar is of the view that, prior to 1978, oral misstatements respecting financial condition rendered debts nondischargeable. See, *e.g.*, Pet'r Br. 4, 20-21, 35-36. Lamar thus asserts that, prior to 1978, a broad understanding of the phrase "was a basis for *denying* discharge rather than allowing it." Br. 45. That is why Lamar says our approach would turn the 1978 amendment into a "sledgehammer" (Br. 35, 36) or a hidden "elephant" (Br. 20).

But Lamar offers no evidence in support of this assumption. The leading treatise, by contrast, explained that the 1960 Act worked just as the 1978 Code was written: "[b]y the express terms of the 1960 amendment, * * * if the false representation is in the form of a false financial statement, it must be in writing." *Collier on Bankruptcy* § 17, at 1638 (14th ed. 1978). See also *Sears, Roebuck & Co.* v. *Sofio*, 138 So. 2d 616, 617 (La. Ct. App. 1962) ("[T]he language of the bankruptcy law is explicit in the requirement that to prevent the discharge of a debt the false statement by the debtor as to his financial condition must be in writing.").

Regardless of the history, Lamar's argument turns foundational principles of statutory construction on their head. In Lamar's telling (Br. 45), although Congress reused the same language, it silently intended for it to take on very different meaning. But the clearest indication of what Congress meant is always the text that it used; that Congress reused the same text indicates that Congress intended for the same meaning.

III. The Eleventh Circuit's construction advances Section 523(a)(2)'s express purposes.

Section 523(a)(2), as construed below, is "perfectly sensible." Pet. App. 13a. The Eleventh Circuit's construction is necessary to achieve Congress's stated goal of debtor protection and to promote efficient and reliable bankruptcy administration.

A. Congress expressly designed the debtor protections in (2)(B) to apply to statements that do not reveal overall net worth.

In amending Section 523(a)(2) in 1978, Congress intended to protect debtors from "practices of consumer finance companies, which sometimes have encouraged * * * falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76-77 & n.13.

Congress detailed the kind of improper practices it sought to eliminate. It observed the "frequent practice" of "consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding." H.R. Rep. No. 95-595, at 130, 1978 U.S.C.C.A.N. 5963, 6091. Unscrupulous creditors provided forms that had "too little space for a complete list of debts." *Ibid.* The loan applicant may have been "instructed by a loan officer to

list only a few or only the most important of his debts." *Ibid.* But, on "the bottom of the form, the phrase 'I have no other debts' is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting." *Ibid.* The creditor would then later claim the borrower made misstatements and use that as a basis to exempt its debt from discharge. *Id.* at 130-131.

In describing these practices, the House Report cited (*id.* at 130 n.82) a bankruptcy decision that had been entered into the record, *In re Hill*, No. 28,738 (E.D. Tenn. 1971). See *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32*, 94th Cong. 981-992 (1975) (Hearings). In that decision, bankruptcy referee Clive Bare explained that these statements were "*not* a 'financial statement' as such." *Id.* at 991 (emphasis added). These documents "contain[ed] no listing of assets," they were "not a balance sheet from which net worth [could] be obtained," and there were "no supporting statements or other financial data." *Ibid.* It was not reasonable for creditors to rely on this information "in determining whether a loan should be made" (*ibid*)—which is precisely why (2)(B) contains a reasonable reliance requirement.

To make matters worse, abusive creditors would threaten suit, as the mere threat of suit "and its attendant costs [were] often enough to induce the debtor to settle for a reduced sum." H.R. Rep. No. 95-595, at 130-131, 1978 U.S.C.C.A.N. 5963, 6091-6092. "[C]reditors with marginal cases" could often extract value "even though the merits of the case [were] weak." *Ibid.*

To end these practices, Congress crafted the safeguards contained in (2)(B). *Field*, 516 U.S. at 76-77. In particular, the 1978 Code introduced the rea-

sonable reliance requirement, which precluded creditors from relying on misstatements that they effectively manufactured. *Ibid.*

This was undeniably the motivation underlying the debtor protections in (2)(B): the legislative reports described the need for particular safeguards against abusive creditors, the statute adopted those protections, and the Court has since recognized this purpose in *Field*. Lamar even acknowledges (Br. 36-37) as much.

But only the Eleventh Circuit's construction captures the example that motivated Congress—a "list" of "loans or debts." H.R. Rep. No. 95-595, at 130-131. Because such a list says nothing about a borrower's assets, it is not the sort of "holistic snapshot" of a debtor's "financial status" that Lamar requires. Pet'r Br. 29. Indeed, referee Bare explained that these documents did *not* reveal "net worth" or any other overall financial metric. Hearings at 991. Lamar's atextual construction thus does not capture the very example for which Congress designed (2)(B).

Beyond that, Lamar would destroy Congress's carefully calibrated policy in the whole. Conniving creditors could tailor their questions to ask a debtor for almost everything but leave out one discrete piece of information—perhaps the value of one's car or one's personal effects. Through such gerrymandering, institutional creditors could purposefully skirt the safeguards that Congress put in place. Or, if Lamar contends that staged disclosures do not trigger (2)(B) (as it must to win the case), a creditor could ask for a list of assets on Monday and then a list of debts on Tuesday.

That is not the law Congress wrote. The term "respecting" is an anti-circumvention tool. Given that devious creditors are the *raison d'être* of (2)(B)'s protections, it was sensible for Congress to ensure that the statute is not easily evaded. The text of the statute lines up precisely with manifest congressional objectives.

B. Writing promotes accurate transactions and reliable dispute resolution.

The Eleventh Circuit's construction also captures Congress's purpose of incentivizing greater reliance on written instruments, which "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." Pet. App. 13a.

Congress "designed" the Bankruptcy Code to provide "predictability" in bankruptcy proceedings. *Schwab* v. *Reilly*, 560 U.S. 770, 790 (2010). And the Court interprets the Code with an eye toward "minimiz[ing] the need for potentially costly additional evidentiary proceedings." *Till* v. *SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (plurality opinion). The writing requirement in Section 523(a)(2)(B) furthers these ends in two main ways.

First, written statements foster accuracy at the outset. While an oral statement "is often informal and spontaneous" (*Joelson*, 427 F.3d at 707), writing imbues a statement with precision and formality. For this reason, "providing an incentive for creditors to receive statements in writing may reduce the incidence of fraud." Pet. App. 13a-14a.

Second, written statements create a record that allows predictable and efficient dispute resolution. In the course of a bankruptcy, parties often dispute the particulars of transactions that occurred years—if

not a decade or more—earlier. The malleability of oral representations makes dispute resolution so far removed in time exceedingly burdensome and error-prone. Not only do memories fade with time, but debtors and creditors also have drastically different incentives that inevitably color recollections. Thus, "a contemporaneous record is inherently superior to a later recollection which is subject to the fallibility of human memory." 5 Mark S. Brodin et al., *Weinstein's Federal Evidence* § 803.07[1], at 803-49 (2d ed. 2017).

As the Court has already observed (*Field*, 516 U.S. at 76-77), Congress designed (2)(B) to mold creditor behavior. The statute "gives creditors an incentive to create writings before the fact," "which provide the court with reliable evidence upon which to make a decision." Pet. App. 13a.

Such writing requirements are commonplace. As the Eleventh Circuit observed, "the requirement of a writing is not at all unusual in the history of the law." Pet. App. 13a. "From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief." *Ibid.*

Congress often enacts writing requirements. ERISA requires that employee benefit plans be "established and maintained pursuant to a written instrument" (29 U.S.C. § 1102(a)(1)), which "gives the plan's participants and administrators a clear understanding of their rights and obligations." *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1296 (5th Cir. 1989). And it avoids "costly, litigious disputes over what informal modifications may have been made to [the] written instrument." *Coleman* v. *Nationwide Life Ins. Co.*, 969 F.2d 54, 60 (4th Cir. 1992).

Congress likewise requires writing in the bankruptcy and debt contexts. See, *e.g.*, 11 U.S.C. § 524(k)(2) (reaffirming debts); *id.* § 524(m)(1) (similar); 15 U.S.C. § 1681a(o)(5)(iii) (consumer reporting); *id.* § 1681b(a)(2) (same); *id.* § 1681b(b)(2)(A) (consumer report for employment purposes); *id.* § 1692g(b) (requiring a consumer to dispute a debt in writing).

Against this, Lamar says that there was no evidence "that this *was* in fact the legislature's purpose." Br. 39. The evidence of this "purpose" is "the text" of the statute that Congress enacted. Scalia & Garner, *supra*, 56. Congress adopted a writing requirement, and the reasons for doing so are ancient. See *Robinson* v. *J.R. Williston & Co.*, 266 F. 970, 972 (1st Cir. 1920) ("Congress was very careful to provide that the statements which should constitute a bar to a discharge * * * should have been made in writing, so that the bankrupt might not be deprived of the benefit of a discharge by evidence of any alleged oral statements.").

Lamar fears the implications for "small businesses and individuals." Br. 42-43. But the protections of (2)(B) *favor* small businesses and individuals in the aggregate. Concerned with abusive policies of some "consumer finance companies," Congress sought to "moderate the burden" imposed on those less sophisticated. *Field*, 516 U.S. at 76-77 & n.13.

In nonetheless attempting to demonstrate implications for small businesses, *amicus* NFIB points (at 13, 16) to its own survey, *NFIB National Small Business Poll: Getting Paid* (2001), perma.cc/6SVV-XV4D. In that report, NFIB evaluated the evidence and concluded that the "direct losses small businesses incur from bankruptcies do not appear to be great"

and that "[l]osses due to bankruptcies occur relatively infrequently." *Id.* at 8. It is hard to understand how NFIB relies on that same report for the contention that "the total losses are staggering." NFIB Br. 17. NFIB itself concluded otherwise.

Lamar suggests (Br. 39-40) that the reasons for favoring writing could arguably apply to other sorts of frauds covered by (2)(A). But the task here is to interpret the statute that Congress wrote. The legislative history reveals that Congress was especially concerned with the practices of creditors involving statements respecting financial condition. See *Field*, 516 U.S. at 76-77 & n.13. That is the "answer" that "softens" any "ostensible anomaly" between the requirements of (2)(A) and (2)(B). *Ibid.*

Finally, *amicus* NFIB (but not Lamar) fears a "super-Statute of Frauds." NFIB Br. 9-11. That concern makes little sense in the bankruptcy context. As Lamar says, "the uniformity of federal law * * * is fundamental to the proper administration of the bankruptcy system." Pet. 16. See also *Bullock*, 569 U.S. at 276. The Constitution authorizes "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). Section 523(a)(2)(B)'s enumeration of elements, including reasonable reliance, confirms that Congress enacted just such a purposefully uniform law here. See *Grogan*, 498 U.S. at 289 (noting that Congress has designed "nondischargeability" to be a "question of federal law.").

C. This case exemplifies the problems inherent in reconstructing the details of decade-old oral conversations.

The proceedings below confirm the wisdom of the statute that Congress wrote. This case, the bankruptcy court observed, turned on "nothing more than a disagreement as to recollection." J.A. 135. And, in resurrecting the oral conversations a full decade later, the court disbelieved testimony from both Appling *and* Lamar.

True, the bankruptcy court did not credit some of Appling's testimony, even though it was corroborated by his wife. See Pet. App. 58a. But the court *also* found that Robert Lamar's account was not accurate. In Lamar's version of the March 2005 meeting, Appling said that he "had *already* prepared the tax return." J.A. 54 (emphasis added). But even Gordon—who was on Lamar's side—disputed Lamar's story. J.A. 35. The bankruptcy court therefore did not accept Lamar's testimony. Pet. App. 54a.

Perhaps Lamar misremembered what had been said a decade prior. One can hardly be faulted for failing to recall, with legal precision, ten-year-old oral conversations. Or perhaps, intentionally or not, Lamar embellished his account. Either way, the bankruptcy court determined that a significant portion of Lamar's recounting of the 2005 oral conversations was not true. The court nonetheless based its judgment, in the main, on finding "Lamar's testimony more credible." See Pet. App. 55a-60a.

Additionally, Lamar's reliance theory is at odds with its own conduct. Lamar's argument is not that it relied on Appling's statements to extend *new* cred-

it.[14] Between the March and November 2005 meetings, Appling paid about $25,000, which was more than the value of work performed during that interval. See Bankr. Ct. Dkt. 66, at 99-100. Appling's debt to Lamar thus decreased by roughly $2,000 over this period. Pet. App. 66a.

Rather, Lamar's theory is that it forwent collection efforts between the 2005 meetings and when it supposedly learned of the truth in June 2006. Pet. App. 61a. Had it "known the truth" in 2005, Lamar says that it would have "immediately" "begun collection activities." *Ibid.* Yet, in June 2006, Lamar did not "immediately" attempt collection. It sued Lamar in state court *six years later*—in 2012. C.A. App. A113.

Because Lamar's actual behavior contradicts its own theory, Appling argued in the court of appeals that Lamar's reliance argument is implausible. See Resp't C.A. Br. 34-37; Resp't C.A. Reply 29-31. This inconsistency suggests that Lamar's reliance theory was an after-the-fact invention. The court did not

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[14] Nor is Lamar's theory that it relied on a promise as to what Appling would do with the refund once received. See Pet. App. 55a, 59a-60a. Appling made no such promise. See pp. 6-8, *supra*. And such a theory is untenable: "normally, fraud cannot be predicated on statements which are in the nature of promises as to future events." *Sims* v. *Natural Prods. of Ga., LLC*, 785 S.E.2d 659, 662 (Ga. Ct. App. 2016). Lamar did not prove—and the bankruptcy court did not find—that Appling represented any future plan "with a present intent not to perform" or with knowledge "that the future event will not take place." *Ibid.* To the contrary, the bankruptcy court found that Appling made the decision as to the use of the refund money *after* the November meeting. Pet. App. 58a.

reach this issue, which therefore remains live in this case.[15]

The statute's text reveals a congressional determination that writing should lie at the heart of a fraud claim, like this one, about the debtor's financial condition. Writing guarantees that dishonest debtors cannot discharge fraudulently incurred debt. It simultaneously protects honest debtors from overreaching creditors, who, in reaction to a bankruptcy petition, may attempt to piece together a new reliance theory years after the fact.

IV. Appling prevails under Lamar's new rule.

Now, for the first time, Lamar says (Br. 29) that "any number of * * * statements providing a more holistic snapshot of one's financial status" qualify as a "statement respecting the debtor's financial condition." Appling wins under this rule.

During the 2005 meetings, Robert Lamar knew that "everything" Appling owned was "tied up in the business" and thus Appling had "no other assets." J.A. 54-55. Lamar explained that, other than the refund, "there were absolutely no assets of any type available to satisfy our fees." *Ibid.* This "knowledge

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[15] This is also relevant to an additional, live issue: whether Lamar proved damage causation. See Resp't C.A. Br. 29-33; Resp't C.A. Reply 21-29. The bankruptcy and district courts held that (2)(A) does not require Lamar to prove that its alleged forbearance caused it injury. See Pet. App. 64a-66a. The Seventh and Ninth Circuits disagree, holding instead that a creditor must prove that it lost valuable collection remedies because of the forbearance. See BIO 27-30. Appling had several other creditors, many of whom had priority to Lamar; Lamar did not, therefore, attempt to prove that its alleged forbearance caused the injury that it asserts. See Bankr. Dkt. 69, at 32.

of [Appling's] financial condition" was a core component of Lamar's "justifiable reliance" contention. Pet. App. 62a. In particular, Lamar "clearly believed that the tax refund was the only source of cash [Appling] would have to pay the fees." *Ibid.*

Lamar's theory, therefore, is that it relied on Appling's statements about the refund and viewed them as material, *because* those statements completed its "holistic snapshot" of Appling's "financial status." Pet'r Br. 29. Having depended on it below, Lamar cannot now walk away from its theory of the case.

It can make no difference if a debtor provides a "holistic snapshot" all at once or if a debtor does so via staged disclosures. In bankruptcy law especially, the Court refuses the "sacrifice of substance to form." *First Nat'l Bank of Cincinnati* v. *Flershem*, 290 U.S. 504, 519 n.11 (1934).

If a creditor could evade the protections for debtors contained in Section 523(a)(2)(B) merely by asking questions piecemeal, then the statute would be toothless. Congress's use of the broadening term "respecting" precludes that result.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

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No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTRODUCTION

Appling and the government offer two different visions for why this Court should hold that a statement about a discrete asset is a "statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2)(A). Appling offers the extreme version. He claims (at 2, 13) this Court *must* interpret the statute that way, because "respecting" *unambiguously* proves that Congress intended the broadest conceivable breadth. "Respecting" doesn't sometimes, or even usually, have this meaning, he insists—it *always* does. *Id.* at 18. Appling dismisses the "honest but unfortunate debtor" principle as a quaint "judicial aphorism," and claims this Court cannot even consider the history of the statute or strange results his rule produces. *Id.* at 37.

The government offers the "light" version. It doesn't seem to claim the statute is unambiguous. And while it piggybacks on many of Appling's arguments, it lacks his verve. Moreover, unlike Appling, the government recognizes (at 2, 9, 30) the importance of the "honest but unfortunate debtor" principle. But the government's main objection, in the end, is its view that it would not make sense as a policy matter to distinguish statements about individual assets from statements about overall financial condition. So, in for a penny, the government goes in for a pound, arguing that Congress intended a broad-based exemption for fraudulent statements that relate to one's "financial circumstances," U.S. Br. 9—even though it ultimately admits that "[r]easonable people can debate the wisdom of [that] decision," *id.* at 33.

This Court should reject both approaches. The extreme version flouts the first rule of statutory construction—the meaning of words is informed by context. And the light version does not work, because there is, in fact, a perfectly sensible reason for Congress to differentiate fraudulent statements about an individual asset. As the government itself has told this Court before, Congress adopted Section 523(a)(2) to address a particular abuse by credit agencies involving financial statements listing *numerous* assets and liabilities to describe an *overall* (or net) position. *See infra* at 16-18. There is no evidence of any creditor abuse when it comes to debtors lying about an individual asset to secure property or services, no reason to think that debtors are vulnerable in that single-asset situation, and no evidence that Congress ever thought it needed to "balance the scales" in favor of debtors who engage in that unmitigated kind of fraud.

Accordingly, this Court should decline to dramatically shift the balance in favor of fraudulent debtors by adopting the broad-based rule Appling and his amici urge—excusing fraudulent statements about anything related to a debtor's finances.

I. THE TEXT POINTS TOWARD A RULE LIMITED TO STATEMENTS *ABOUT* A DEBTOR'S OVERALL FINANCIAL STATUS

Appling claims (at 2, 13) that there is one, and only one, possible reading of "statement respecting . . . financial condition." But this case is not that simple. While the language *could* be read to mean any statement "related to" one's finances (Appling's position), it can also mean any statement "about"

one's overall financial status (ours). A fair reading of the text points to the narrower construction.

A. "Respecting" Also Is Used To Describe The Subject Of A Statement

Appling acknowledges that his position ultimately rests on a single word—"respecting." His "foundational point," he says (at 18), is that "the word 'respecting' has a broadening effect when used as a preposition in a statute," "add[ing] breadth to the object it modifies" wherever it appears.

That foundation does not hold up. Indeed, Appling himself acknowledges that one common definition of "respecting" is "about." *Id.* (quoting *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967)). And when "respecting" is used as "about," it simply describes the *subject* (here, "financial condition") of its object (here, "statement"), however broad or narrow that subject may be. *See, e.g.*, *About, adv., prep., adj.* and *conj.*, Oxford English Dictionary (online ed.), http://www.oed.com (last visited Apr. 9, 2018) ("Of a discourse, text, film, etc.; on the subject of, dealing with."). So, too, with many of the similar definitions of "respecting," such as "concerning" and "regarding," that Appling himself concedes (at 18) are relevant here.

Appling dismisses (at 20) any consideration of the alternative meanings of "respecting" as "a game of dictionary hide-and-seek." But consulting dictionary definitions and considering which meaning makes sense in context is the bread and butter of textualism. *See Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("most words have different shades of meaning and consequently may be variously construed" (citation omitted)); Antonin

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356, 418 (2012). We do not suggest (as Appling erroneously claims (at 20 (emphasis added)) "that 'respecting' *cannot* mean 'related to.'" Our point is simply that it does not *always* mean "related to," and that—in the context here—the more natural meaning is "about."

Appling is also wrong (at 18) that "respecting" has the same broad, "related to" meaning wherever it is used "throughout American law." In *Hancock v. Train*, for example, this Court rejected the argument that a state "requirement that all air contaminant sources secure an operating permit is a [state] 'requirement respecting control and abatement of air pollution.'" 426 U.S. 167, 183 (1976) (quoting 42 U.S.C. § 1857f (1976)). Reading this language in context, the Court held that only the "state-established air quality and emissions standards" themselves—not every other requirement *related to* them—qualified as "'requirement[s] respecting control and abatement of air pollution.'" *Id.*

Nor do the cases Appling cites establish that "respecting" must mean "related to." *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), did not rely on a plain, unambiguous meaning of "with respect to" in interpreting the Voting Rights Act (VRA)'s "standard, practice, or procedure *with respect to* voting" language. 52 U.S.C. § 10304(a) (emphasis added). To the contrary, the Court was cognizant that, as Justice Stevens later explained, "a narrow reading of the text of the [VRA] might have confined the coverage of § 5 to changes in election practices that limit individual voters' access to the ballot." *Morse v. Republican Party of Va.*, 517 U.S. 186, 204 (1996) (opinion announcing the judgment of

the Court). And it was only after the Court concluded that "Congress intended § 5 to have 'the broadest possible scope' reaching 'any state enactment which altered the election law of a covered State in even a minor way'" (*id.*) that the Court decided that a "related to" meaning made sense in context. Here, by contrast, the statutory history and background principles clearly point to a narrow construction. *See* Part II, *infra*.

Appling's reliance (at 18) on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is similarly misplaced. While *Lemon* has attracted much commentary in this Court, it is safe to say that is has never been viewed as a model for plain-meaning construction, much less for interpreting a reticulated statutory code. The very paragraph on which Appling relies declares that "[t]he language of the Religion Clauses of the First Amendment is at best opaque," and the Court goes on to determine the meaning of the Clause by looking to its purposes. *Id.* at 612. The same goes for the "Property Clause" cases. *See* Resp. Br. 19. They do not turn on the notion that "respecting" is always unambiguous, but rather on the context and history of the Clause. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976).

In short, these cases simply show "respecting" *can* mean "related to"—which no one disputes. They do not establish Appling's "foundational point" (at 18) that "respecting" *always* has the broadest, "related to" meaning, no matter the context.

B. Context Refutes Appling's Expansive Interpretation Here

Context strongly points to the conclusion that here "respecting" means *about*, not *related to*.

1. The first clue is that "respecting" modifies "financial condition." Both Appling (at 25) and the government (at 12-13) admit that "financial condition" describes a debtor's "*overall* financial status." (Emphasis added.) The Bankruptcy Code itself defines "insolvent" in terms of "financial condition" (11 U.S.C. § 101(32)(A)), and makes clear that Congress does not equate "financial condition" with "assets" or "liabilities" *(id.* § 1106(a)(3) (authorizing trustees to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor"). The Code thus proves that Congress uses "financial condition" as a relative term to describe an overall state—not any single item, but rather a net of positive and negative inputs.

Had Congress intended to craft an exception that applied to statements about individual assets, it could have referred to assets separately (as it did in 11 U.S.C. §§ 1103(c)(2) and 1106(a)(3)) or used a term like "finances," "financial circumstances," or "financial information," which would sweep in individual items without regard to overall status. "But Congress didn't choose those other words. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S. Ct. 784, 787-88 (2018). Like any other word or term of art, Congress's use of "financial condition" must be given effect.

Appling dismisses this point (at 26) as "merely" demonstrating "that there are different ways to write statutory language that yield similar meaning." But this Court has often pointed to similar considerations in rejecting an interpretation. *See, e.g., Levin v. United States*, 568 U.S. 503, 514-15

(2013); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7-8 (2000); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 728 (2005) (Thomas, J., concurring) ("The [Establishment] Clause prohibits Congress from enacting legislation 'respecting an *establishment* of religion'; it does not prohibit Congress from enacting legislation 'respecting religion'"). Moreover, Appling offers no cogent explanation of why Congress would have selected a distinctive term like "financial condition," only to erase the very thing that makes it distinctive.

Appling's interpretation strips "financial condition" of meaning as a relative term—describing an *overall* state—because any statement about an asset (or input) qualifies, regardless of whether it says anything about the other side of the equation. Under Appling's rule, a statement that "I have a quarter in my pocket" is a "statement respecting financial condition" because any asset (or liability) ultimately, and directly, impacts one's overall financial status. In the same vein, under Appling's reading of "respecting," a statement that "Bryce Harper struck out in the ninth" would be a "statement respecting batting average," as would a statement that "Bryce was robbed of a home run by a leaping catch at the wall." And a statement that "He missed the last two questions on his math test" would be a "statement respecting GPA." But in ordinary parlance, that makes no sense.[1]

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[1] Appling's lead example (at 1)—a statement that "she just won $500,000 in the lottery"—reveals that the lucky winner secured a windfall on the income side of the balance, but it still says nothing about her *overall* financial status. *Cf.* Ric Edelman, Commentary, *Why So Many Lottery Winners Go*

The government (at 8) responds that, "A statement about a patient's disease is one respecting the patient's medical condition." But a disease is *itself* a condition. *See Disease*, Oxford English Dictionary, *supra* ("A condition of the body . . . in which its functions are disturbed or deranged"). So a statement that "He has cancer" is naturally understood as a "statement respecting medical condition." By contrast, a discrete asset (or liability) is not a condition. Accordingly, the relevant analogy is whether a statement that "I weigh 170 pounds," or "I am male," is a "statement respecting medical condition." Both weight and gender can relate to or impact one's medical condition depending on other factors. But just mentioning someone's weight or gender would not, in any ordinary usage, be a "statement respecting medical condition."

Appling claims (at 1, 13, 26, 27) that "financial condition" still has a "bound[ing]" effect on his reading. But only in the sense that a statement about something that has nothing to do with finances isn't covered. Yet the relevant question is whether, under Appling's reading of "respecting," "financial condition" means anything different than "finances," "financial circumstances," or the like. And the answer is plainly no. "Financial condition" does no work as a relative term. By contrast, reading "respecting" to mean *about* gives effect to both "respecting" *and* "financial condition."

2. Other parts of the Bankruptcy Code reinforce the narrower reading. When Congress originally enacted the "respecting . . . financial condition"

Broke, Fortune, http://fortune.com/2016/01/15/powerball-lottery-winners/ (last visited Apr. 9, 2018).

language in 1926, it adopted another provision—just two pages later—penalizing the falsification of records "affecting or *relating to* the *property or affairs of* a bankrupt." Pub. L. No. 69-301, §§ 6, 11, 44 Stat. 662, 663-64, 665 (1926) (emphases added). And in 1978, in the bill adopting Section 523(a)(2)(A), Congress enacted a provision waiving non-bankruptcy requirements "*relating to* financial condition" in certain circumstances. 11 U.S.C. § 1142(a) (emphasis added); *see also* Pub. L. No. 95-598, §§ 523, 1142, 92 Stat. 2549, 2590, 2639 (1978).

The fact that Congress actually used "relating to" in nearby provisions of these Acts strongly suggests that Congress intended a different meaning when it used "respecting" in Section 523(a)(2). As this Court has held, when "Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

In response, Appling suggests (at 20 n.3) that Congress just threw some unnecessary linguistic variety into the Bankruptcy Code to spice things up for readers. But that is not a sound model of interpretation, especially where, as here, the words have different meanings that may be used to express different concepts. *See Corley v. United States*, 556 U.S. 303, 315 (2009) (applying *Russello* rule despite government's insistence that alternative words were "virtually synonymous . . . in this statutory context" (alteration in original) (quoting government's brief)).

Appling and the government also ignore Congress's use of "property or affairs of a bankrupt" in addressing falsifications about *individual assets*,

rather than "financial condition." They cannot seriously contend *these* two phrases are synonymous, yet under their interpretation, the phrase "statement respecting the debtor's . . . financial condition" is just as broad as the phrase "affecting or relating to the property or affairs of a bankrupt." That makes a mockery of the *Russello* rule.

While basically just ignoring these important textual differences, Appling points (at 24-25) to Congress's use of the phrase "statement *of* financial condition" elsewhere. But our interpretation *accounts* for that difference. "Statement of financial condition" is a term of art referring to a "balance sheet." *See Statement of Financial Condition*, Black's Law Dictionary 1629 (10th ed. 2014) ("See balance sheet."); *Balance Sheet*, *id.* at 170 ("[a]lso termed *statement of financial condition*"). And we do not claim that the carve-out in Section 523(a)(2)(A) is limited to formal balance sheets. Instead, by using "respecting" rather than "*of*" to modify "financial condition," Congress ensured that the exception would extend beyond balance sheets to less formal or detailed statements about a debtor's overall financial status, such as statements of net cash flows (like those solicited and then abused by some credit agencies). *See* Opening Br. 8, 24-25; *infra* at 16-18. To qualify, however, the statement must still refer to an *overall* (or net) financial state.

For this reason, Appling is wrong when he says (at 1, 13, 29) that our interpretation gives no effect to "respecting." It does. And what distinguishes our interpretation from Appling's is that it gives effect to "respecting" *as well as* "financial condition."

II. THE HISTORY AND PURPOSE OF SECTION 523(a)(2)(A) CONFIRM THAT CONGRESS DID NOT INTEND TO EXCUSE ALL ORAL LIES RELATED TO FINANCES

When one opens the lens to consider the particular abuse at which Section 523(a)(2)(A) is aimed and the longstanding background rule against which Congress acted, it is no wonder that Appling is so insistent (at 2) that this Court cannot go "beyond the text itself." *See also id.* at 14, 36.

A. The "Related To" Rule Creates An Implausibly Large Exception That Even Appling And His Amici Do Not Defend

In order to provide a textual basis for a rule under which he can prevail, Appling relies (at 18) on the most expansive definitions of "respecting"—"relation to," "relating to," and so forth. But that interpretation creates an implausibly broad exception favoring fraudsters, taking an unthinkably big bite out of Section 523(a)(2)(A).

Indeed, this Court has previously explained that when Congress adopted Section 523(a)(2)(A), it was informed by the "widely accepted distillation of the common law of torts" laid out in the Restatement (Second) of Torts, which was "published shortly before Congress passed the Act." *Field v. Mans*, 516 U.S. 59, 70 (1995). Yet "[u]nder the broad interpretation [of 'statement respecting financial condition'], debts incurred as a result of many of the fraudulent statements cited in the Restatement (Second) of Torts could not be excepted from discharge under § 523(a)(2)(A)." *In re Joelson*, 427 F.3d 700, 710 (10th Cir. 2005) (citation omitted) (listing examples of false statements).

If truly given effect, a "related to" reading of "respecting" would leave little of Section 523(a)(2)(A)'s general rule against the discharge of debts obtained by "false pretenses, a false representation, or actual fraud." When, after all, would a creditor ever justifiably rely on a statement that was *not* somehow *related to* the borrower's financial condition? Neither Appling nor the United States has an answer. Instead, after pushing the broadest "related to" meaning of "respecting" to find a textual hook for their rule, they quickly shift gears and invent atextual limits to cabin their rule's breadth and the damage it would inflict.

The limiting principle Appling floats (at 23 (emphasis added)) is that a statement "respecting financial condition" must describe a "debtor's *assets or debts*, either individually or in the aggregate." But why would a "related to" rule stop at "assets or debts"? Appling seems to recognize (at 27) that other statements—like "a debtor's statement that she is a licensed architect"—are "related to" the debtor's financial condition (as they surely are), but under his rule such statements do not qualify. Thus, the statement "Joe lost $50 at the poker table last night" is a statement sufficiently "related to" Joe's financial condition to qualify under Appling's rule, while the statement "Joe runs a hedge fund" or "plays in the NBA" is not. That is nonsense.

Of course, if Congress had actually used "relating to" in Section 523(a)(2)(A), like it did in nearby provisions, the Court would have to search for "a cutoff at some point where the connection [is] thin to the point of absurd." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 149 (2009). In that circumstance "[the Court] simply *must* go beyond the unhelpful text and

the frustrating difficulty of defining its key term." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (emphasis added). But Congress did not use "relating to" here—it used "respecting." And as explained, in the context here "respecting" can supply its own limitation ("about"), obviating the need for this Court to invent lines separating the too-absurd from the not-quite-too-absurd.[2]

The government takes a similar approach. It recognizes (at 18) that "[s]tatements respecting a debtor's finances are of course common in credit transactions"—which alone confirms the significant impact of a rule that covers statements "related to" finances. But after arguing that "respecting" means "related to," it appears (at 19) to categorically rule out false statements about things like professional qualifications (*e.g.*, "She has an MBA from Harvard") that invariably are *related to* the debtor's financial condition, even though they do not refer to any particular asset or liability.

Then the government adds (at 11) a new wrinkle: To be a statement "respecting financial condition," the statement must *also* be "offered as evidence of ability to pay a debt." Neither the Eleventh Circuit

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[2] Appling's discussion (at 33-35) of Fourth Circuit case law is therefore beside the point. *See also* U.S. Br. 19-20. We do not dispute that courts are *capable* of simply inventing (and declaring) limits on "relatedness." Our point is that the Court should reject an interpretation that requires such judge-made lines when the statute can be read to avoid that enterprise. Moreover, even accepting the Fourth Circuit's own limits, its construction still excuses a broad swath of lies about finances (and individual assets) that Congress did not intend to bless.

nor Appling has advanced this test. For good reason. While the "ability to pay" a particular debt certainly can be related to one's "financial condition," the two are not necessarily interchangeable. For example, in the prototypical situation in which a borrower commits a specific piece of property as collateral for a loan, the borrower may be up to the gills in debt, yet still able to pay the loan if the collateral is sound.

Moreover, when Congress adopted the "respecting . . . financial condition" language in 1926, a "uniform false statements" law enacted in several States made it a crime to make a "false statement in writing . . . respecting the financial condition, *or means of ability to pay*" for the purpose of obtaining credit. Richard P. Ettinger & David E. Golieb, *Credits and Collections* 193 (2d ed. 1917) (emphasis added) (describing uniform act and quoting New York law). Yet when Congress adopted the language at issue here, it explicitly limited its scope to statements "respecting . . . financial condition."

The government's "ability to pay" test also would only complicate the Section 523(a)(2) analysis. Even the government acknowledges (at 14) that under its rule, the same exact words can be a "statement respecting financial condition," or not. How does one tell the difference? Not clear. The government initially seems to suggest that what matters is the *debtor*'s intent (at 9, 14), but then indicates (at 15) that what matters is why the *creditor* "viewed the debtor's allegedly false representation as relevant." If the former, then the government's claim (*id.*) that its test does not require new factual evidence about subjective intent is wrong; if the latter, then it is hard to see how a recipient's after-the-fact decision about how to use a particular statement can dictate

whether the debtor made a false statement "respecting financial condition" or not.[3]

The good news is that all this can be avoided by simply adopting the rule Congress enacted and holding that a statement about an individual asset is *not* a "statement respecting financial condition," regardless of *why* the statement was offered.

B. The Statutory History And "Honest Debtor" Rule Confirm That Congress Intended Only A Narrow Exception

The problems inherent in the sheer breadth of Appling's interpretation come into even starker relief in the light of the longstanding policy against discharging debts incurred through fraud and the specific problem that Congress targeted when it enacted Section 523(a)(2) in 1978.

1. As we have explained (Opening Br. 35-36), if there is one pole star that Congress has followed when it legislates in this area, it is that bankruptcy law should favor only the "honest but unfortunate debtor." In response, Appling belittles (at 18, 36-37) that principle as nothing more than an "hoary" "aphorism," and his law professor amici go further and essentially ask this Court to hold that the "fresh start" principle trumps everything.

That would be a truly radical development. As the government has previously told this Court in *Grogan v. Garner*, 498 U.S. 279 (1991), the policy against discharging debts incurred by fraud is "deeply embedded" in bankruptcy law. U.S. *Grogan*

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[3] The government's "ability to pay" test gets even stranger when it comes to "eligibility for [a] benefit." U.S. Br. 11 n.2.

Br. 13, 1990 WL 10022411. And based on that textually-grounded congressional policy, this Court has repeatedly held that ambiguities in Section 523(a)(2) should be resolved in a way that favors "the interest in protecting victims of fraud" over "the interest in giving perpetrators of fraud a fresh start." *Grogan*, 498 U.S. at 287; *see also Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) (same); *Kelly v. Robinson*, 479 U.S. 36, 48-49 (1986). There is no basis for any different approach here.

Unlike Appling, the government acknowledges the Bankruptcy Code's "general policy of affording relief only to an 'honest but unfortunate debtor.'" U.S. Br. 2 (citation omitted). Because all agree that the "statement respecting financial condition" language creates an exception to that policy in at least *some* circumstances, however, the government concludes (at 30) that this background rule cannot come into play at all. But just because Congress chose to make an exception doesn't mean it abandoned this foundational concern altogether. *See Maracich v. Spears*, 570 U.S. 48, 60 (2013). In choosing between two permissible constructions, the "honest debtor" principle is still probative in determining *how far* Congress intended to go.

2. So is the history of the statute. As we have explained (Opening Br. 7-12, 36-38), the record going back to 1926 makes clear that Congress adopted the "respecting financial condition" language to capture written financial statements and credit scores published by credit reporting agencies purporting to summarize an overall financial condition. Indeed, Congress deliberately tightened earlier drafts of the provision so that it would cover such overarching financial statements without "cover[ing] too much

[other] ground." *Revision of the Bankruptcy Law: Hearing on H.R. Res. 353 Before the H. Comm. On the Judiciary*, 68th Cong. 45, 47 (1925).

The 1978 enactment shared a similar focus, if for a different reason. As the government explained in *Field v. Mans*, Section 523(a)(2) was enacted "to address a problem of creditor abuse that had arisen with respect to fraud claims *based on technically incomplete written financial statements*." U.S. *Field* Br. 6 (emphasis added). Specifically, Congress responded to reports that some consumer finance companies were requiring written financial statements listing detailed information about applicants' overall financial health in order to dupe applicants into simply *omitting* debts or other requested items. The consumer finance companies would then use that omission—which rendered the financial statement false—to insulate their claims from discharge. *See* Opening Br. 36-37; *Field*, 516 U.S. at 76-77 & n.13. But there is no evidence of complaints about similar creditor abuses in cases in which credit or services were extended based on representations about only a *single* asset (or item of collateral)—an entirely different scenario.

3. Without denying any of that, Appling claims that interpreting "statement respecting financial condition" to cover only statements about a debtor's overall financial circumstances would fail to capture creditor abuses described in the legislative history to the 1978 Act that involved financial forms with truncated spaces for listing debts but "contain[ed] no listing of assets" and were "not a balance sheet from which net worth [could] be obtained." Resp. Br. 50 (alterations in original) (citation omitted).

But that's simply incorrect. Contrary to this argument that the forms in question revealed no information about the debtor's overarching financial status, those forms contained information about not only outstanding debts but also the borrower's income. As a Federal Trade Commission attorney testified during the 1975 hearings, "[t]he most important component of the [credit] application" was "a determination of the consumer's net cash flow position, computed by totaling all periodic obligations . . . and subtracting the figure thus obtained from monthly net income." *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32*, 94th Cong. 759 (1976) (1975 Hearings) (statement of David H. Williams); *see also* H.R. Rep. No. 95-595 at 168 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963 (citing that testimony).[4] This is a prototypical assessment of "financial condition" for the low-income borrowers that were the subject of the abuse on which Congress was focused—and our rule captures it, without sweeping in everything else.

4. This statutory history alone answers the government's argument (at 30) that there is "no sound policy rationale" for distinguishing false statements about overall financial status from statements about individual assets, and that our rule is thus "haphazard" (at 17). As the government itself told this Court in *Field v. Mans*, Congress enacted the statute to address a particular "pattern of abuse by consumer finance companies" (*Field* Oral

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[4] In the specific case Appling highlights (at 50), the borrower reported a "Net Wkly. Sal."—*i.e.*, Net Weekly Salary—of $125, and the form had a space to report the "Surplus" of income over expenses and debts. 1975 Hearings at 1001.

Arg. Tr., 1995 WL 605987, at *26 (Oct. 2, 1995)), and that practice had nothing to do with the situation where a debtor lies about an *individual* asset.

Moreover, the "relative equities," *Field*, 516 U.S. at 76, tip in favor of creditors where, as here, (a) the creditor has not deliberately *invited* a false statement, and (b) a debtor lies about an *individual* asset of which he has knowledge as opposed to simply submitting an incomplete list of *many different* assets or debts. There is no practice of debtors being duped into lying about a single asset.

Appling nevertheless surmises (at 50-51) that, if this Court adopts our rule, "devious creditors" would simply make piecemeal requests—for example, asking "for a list of assets on Monday and then a list of debts on Tuesday." This concern is purely manufactured for litigation. Neither Appling nor the government identifies a single example of such behavior in the hundreds of cases that have applied the narrow rule we advocate. Not one. And that is because any creditor who attempted to manipulate the discharge rules in that manner would be hard pressed to establish justifiable reliance—and would likely find itself paying the debtor's attorney's fees under 11 U.S.C. § 523(d) to boot.

C. Appling's Remaining Attempts To Distort The History And Purpose Of Section 523(a)(2) Fail

1. Lacking evidence that Congress was concerned with false statements about individual assets in either 1926 or 1978, Appling and his amici focus instead on a handful of judicial decisions in the half-century in between that they say require this Court to hold that Congress intended a broad

interpretation of "statement respecting financial condition." *See* Resp. Br. 42-45; U.S. Br. 23-24. For several reasons, that ratification theory fails.

First, Appling and the government do not dispute that the vast majority of cases during those years involved false statements about overall financial status. We collected a sample of those cases in our opening brief (at 43 & n.5), but to be clear, there are many, many more. Those cases are all consistent with our construction, and if Congress was thinking of any lower court case law in 1978, it is surely that mountain of "financial statement" cases that it would have had in mind. Against that, Appling musters only a handful of cases of which there is absolutely no evidence that Congress was aware.

That alone dooms Appling's ratification theory. Whatever force this ratification principle may have in the abstract, this Court has held that it is "without significance" where "the record of congressional discussion preceding reenactment makes no reference to the" particular authorities at issue, "and there is no other evidence to suggest that Congress was even aware of the . . . interpretive position." *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (refusing to find ratification of an agency interpretation in such circumstances); *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 299 (1995) (similarly declining to find ratification of pre-passage judicial decisions).

And here, there are additional reasons why presuming ratification makes no sense. Given that Congress was specifically concerned with creditor abuses involving statements about overall financial status, *see supra* at 16-18, Congress simply had no reason to search for any of the needles in the

haystack Appling has identified involving individual-asset statements. And even then, there is absolutely no basis to presume that Congress would have carried that construction forward when it sought to achieve an entirely different policy objective in the 1978 Act. In every single one of the pre-1978 cases Appling cites, a broad interpretation favored *creditors* as a basis for *denying* discharge.

2. Finally, Appling doubles down on the Eleventh Circuit's argument that Section 523(a)(2) should be read in light of a congressional "purpose of incentivizing greater reliance on written instruments." Resp. Br. 51. But the sole evidence he offers of that purpose is Section 523(a)(2)(B) itself. And, as explained, the history of that section makes clear that Congress did not enact it with some broad aim of encouraging the use of writings or the reliability of evidence, but rather to address a particular abusive practice involving financial statements about overall financial status. After all, if Congress really did have the broad "writing" purpose Appling suggests, there is no reason it would have stopped at written statements about *finances*. Appling does not even attempt one.

This case illustrates, moreover, the windfalls for fraudsters that attempting to promote "written statements" in such a blunderbuss way would create. On Appling's own account, he told Lamar at the very least that he was expecting a "potential[]" refund of "approximate[ly]" $100,000, based on what he had been told by his accountant. Resp. Br. 10 (quoting J.A. 115, 35). As the bankruptcy court noted, though, Appling's total tax paid in the years in question "was only $84,990." Pet. App. 55a. Given the size of his total tax, "[i]t is simply not plausible

to believe that" Appling's accountant told Appling that he had a "potential refund" of "approximately $100,000." *Id.* For all Appling's protestations now that a written statement might have made classic determinations about the sincerity and veracity of witness testimony unnecessary at trial, the fact is that even on *Appling*'s version of the story, it is clear that he told Lamar a $100,000 lie.[5]

Appling and the government also just ignore (or deny) the impact of their position on small businesses and regular folk. As the amicus National Federation of Independent Business has explained (at 12-16), in the real world businesses and individuals still rely on one's spoken word, especially when it comes to smaller or routine transactions involving the exchange of property or services based on a representation about an individual asset or item of collateral. There is no reason to think that Congress chose to advance the interests of fraudulent debtors over those of innocent creditors in that commonly recurring situation.

Instead, as the government itself told this Court in *Field*, "Congress intended that . . . as between an intentionally dishonest debtor on the one hand, and an unwary creditor on the other hand, that the

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[5] There is also no basis for Appling's closing suggestion (at 57-58) that he could prevail even under a narrower rule. This case has been litigated on the premise that Lamar relied on Appling's false statements about his tax return, because that's what Lamar in good faith did. *Cf.* Sup. Ct. R. 15.2. The fact that Lamar was aware of some of Appling's other financial information based on its representation of him in a business dispute does not convert his false statement about a single asset into a statement about his overall financial condition.

creditor should prevail, except where there had been a pattern of abuse in precode cases" (*Field* Oral Arg. Tr., 1995 WL 605987, at *25)—which, as discussed, is utterly lacking in the fact pattern here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

v.

R. SCOTT APPLING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

In our opposition brief (Opp. 12), we pointed to the pending appeal *Haler* v. *Boyington Capital Group, LLC*, No. 17-40229 (5th Cir.).

On December 29, 2017, the Fifth Circuit issued an unpublished opinion in that case. See *Haler* v. *Boyington Capital Group, LLC*, 2017 WL 6729967 (5th Cir. 2017). The court ruled in favor of the debtor based on existing Fifth Circuit precedent; it found that the debtor's statements constituted "statements respecting * * * financial condition," as that phrase was construed by *Bandi*. As a result, *Haler* no longer presents a vehicle for resolving any perceived distinction between the legal holding in *Bandi* and the decision at issue here.

We respectfully submit that certiorari remains premature until a court of appeals rejects the holding below in a case where that issue is outcome determinative.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Notwithstanding the views of the Solicitor General, the Court should deny certiorari. Review of the question presented is premature, and the decision below is correct.

1. The issue presented does not currently warrant review. To begin with, the United States agrees with our demonstration (Opp. 10-11) that the Eighth Circuit "did not expressly interpret" the relevant statutory text. U.S. Br. 11 n.3.

As to the Fifth and Tenth Circuits, the government contends that their failure to "place significant weight on the word 'respecting' reflects only that those courts deemed other considerations more persuasive in interpreting the statutory text." *Id.* at 12. But there is no evidence that those courts considered the effect of the word "respecting" *at all*. Indeed, the government does not identify a single passage in either decision that so much as hints at consideration of the argument that the Eleventh Circuit found dispositive.

As we said earlier (Opp. 11), review is premature until another circuit considers—and rejects—the reasoning adopted below. Granting review now would deprive the Court the benefit of careful consideration of this issue by the lower courts.

Review is particularly unwarranted because a case currently pending in the Fifth Circuit provides that court an opportunity to align with the decision below. Indeed, the debtor in that case dedicated most of his brief to arguing that the Fifth Circuit should overrule *Bandi*. See Appellant Br. 18-37, *In re Haler*, No. 17-40229 (5th Cir.). If the Fifth Circuit declines that request, other opportunities to address the ques-

tion presented assuredly will arise. See U.S. Br. 11 ("the question presented arises regularly").

2. Additionally, the Court should deny review because the decision below is correct.

The government agrees with all aspects of our position on the merits. The statutory text, which includes the term "respecting," compels the construction adopted by the Eleventh Circuit. U.S. Br. 14-15; see also Opp. 12-18. The statute's lineage confirms this result. U.S. Br. 15-17; see also Opp. 24-27. The Eleventh Circuit's interpretation advances the manifest statutory purpose of encouraging written instruments, which bring certainty and ease of adjudication to bankruptcy disputes. U.S. Br. 17-18; see also Opp. 18-21. And it precludes the "substantial line-drawing problems" entailed by petitioner's alternative construction. U.S. Br. 18-21; see also Opp. 21-24.

Indeed, the government acknowledges that, in its role as an institutional creditor, it "might benefit in some circumstances from" petitioner's construction. U.S. Br. 22. The government nonetheless recognizes that "the better reading of the statutory text is that a statement concerning a single asset, when tendered as evidence of the debtor's ability to pay, is a 'statement respecting the debtor's * * * financial condition within the meaning of Section 523(a)(2)." *Ibid.*

Review is unnecessary when the decision below is so clearly correct.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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BRIEF FOR THE UNITED STATES
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QUESTION PRESENTED

The Bankruptcy Code bars an individual debtor from receiving a discharge of any debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's * * * financial condition." 11 U.S.C. 523(a)(2)(A). A debt that arises from a fraudulent statement "respecting the debtor's * * * financial condition" is also nondischargeable, but only if the statement is in writing and additional requirements are met. 11 U.S.C. 523(a)(2)(B). The question presented is as follows:

Whether a debtor's statement concerning one of his assets, offered as evidence of his ability to pay a debt, is a "statement respecting the debtor's * * * financial condition" within the meaning of 11 U.S.C. 523(a)(2).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the meaning of the phrase "statement respecting the debtor's * * * financial condition" in a Bankruptcy Code provision that addresses the dischargeability of certain fraudulently incurred debts. 11 U.S.C. 523(a)(2)(A)-(B). The United States is the largest creditor in the Nation, and federal agencies frequently appear as creditors in bankruptcy cases. Additionally, United States Trustees—who are Department of Justice officials appointed by the Attorney General—supervise the administration of bankruptcy cases. 28 U.S.C. 581-589a; see 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under [the Bankruptcy Code]."). The United States thus has a substantial interest in this Court's resolution of the question presented. At the

Court's invitation, the United States filed a brief at the petition stage of this case.

STATUTORY PROVISION INVOLVED

Pertinent portions of 11 U.S.C. 523 are reprinted in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. A central purpose of the federal bankruptcy system is to give insolvent debtors a "fresh start" by discharging their debts, while ensuring the maximum possible equitable distribution to creditors. See, *e.g.*, *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 364 (2006); *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918). In furtherance of a general policy of "affording relief only to an 'honest but unfortunate debtor,'" however, Congress has enacted various provisions that prevent or limit the discharge of debts that arise from a debtor's fraudulent acts. *Cohen* v. *de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991)). Such provisions reflect Congress's evident determination that, in certain circumstances, "creditors' interest in recovering full payment of debts * * * outweigh[s] the debtors' interest in a complete fresh start." *Grogan*, 498 U.S. at 287.

Section 523(a) of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, declares various kinds of debts to be nondischargeable in an individual's bankruptcy. 11 U.S.C. 523(a).[1] As relevant here, Section 523(a)(2)(A) provides that a discharge under Chapter 7, 11, 12, or 13 of the

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[1] Although Section 523(a) applies by its terms only to "individual debtor[s]," 11 U.S.C. 523(a), Congress has extended its application to corporate debtors under Chapter 11 with respect to debts owed "to a domestic governmental unit" or "to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute." 11 U.S.C. 1141(d)(6); cf. 31 U.S.C. 3729-3733 (False Claims Act).

Bankruptcy Code "does not discharge an individual debtor from any debt * * * for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition*." 11 U.S.C. 523(a)(2)(A) (emphasis added).

To establish nondischargeability under Section 523(a)(2)(A), a creditor typically must show, *inter alia*, "justifiable" reliance on the debtor's deceptive or fraudulent conduct. *Field* v. *Mans*, 516 U.S. 59, 61, 69-76 (1995). Courts have also construed Section 523(a)(2)(A) to require proof of "materiality" and "intent [to deceive]." *Id.* at 68; see, *e.g.*, *In re Curran*, 855 F.3d 19, 28 (1st Cir. 2017) (listing elements).

Section 523(a)(2)(B) addresses the dischargeability of debts incurred through "a statement * * * respecting the debtor's or an insider's financial condition." 11 U.S.C. 523(a)(2)(B)(ii). Section 523(a)(2)(B) specifies that, for a debt incurred through the use of such a statement, the debt is excepted from discharge only if the statement was "in writing"; was "materially false"; was "reasonably relied" upon by "the creditor to whom the debtor is liable"; and was "caused to be made or published" by the debtor "with intent to deceive." 11 U.S.C. 523(a)(2)(B)(i)-(iv). Section 523(a)(2)(B) thus differs from Section 523(a)(2)(A) by requiring that the statement be "in writing" and that the creditor show "reasonabl[e]" (rather than simply justifiable) reliance.

2. a. In July 2004, respondent hired petitioner, a law firm, to represent him in litigation against the former owners of a business he had recently purchased. Pet. App. 46a-47a. Respondent soon fell behind on his legal bills, and by March 2005 he owed petitioner more than

$60,000. *Id.* at 47a. Petitioner advised respondent by letter that it would terminate its representation unless the overdue fees were promptly paid. *Id.* at 47a-48a.

On March 18, 2005, respondent met with Robert Lamar, a partner of the petitioner law firm, at the office of Robert Gordon, who served as local counsel. Pet. App. 47a-48a. According to Lamar, respondent stated at that meeting that he had "absolutely no assets of any type available to satisfy [the attorneys'] fees" except for a "substantial [tax] refund * * * in excess of $100,000," which respondent allegedly represented that he would soon receive and which he "pledge[d]" toward petitioner's fees. J.A. 54-55; see J.A. 66. Gordon recalled a similar promise, although in his recollection respondent had not yet prepared the amended tax return, and the $100,000 figure was an estimate. J.A. 35. According to respondent, although he told Lamar and Gordon that he would be pursuing a tax refund of "potentially $100,000," he made no "promise[s]" about that amount or about how he would spend any refund. J.A. 98, 115. After the meeting, petitioner continued to represent respondent and did not pursue collection of the fees. Pet. App. 48a; J.A. 36, 55.

In June 2005, respondent and his wife filed an amended tax return, which sought a refund of $60,718. Pet. App. 48a. In October 2005, the Internal Revenue Service adjusted the amount to $59,851 and issued the refund. *Ibid.* Respondent did not use the refund to pay the overdue legal fees. *Id.* at 48a-49a.

In November 2005, at respondent's request, respondent and his wife met with Lamar to discuss the outstanding fees and the future of their professional relationship. Pet. App. 49a; J.A. 56-58, 106-109. According to Lamar, respondent falsely stated at this meeting that

he had not yet received the tax refund, and also failed to disclose that the refund was for significantly less than $100,000. J.A. 57, 63, 67. According to respondent and his wife, respondent informed Lamar at this meeting that he had received the tax return but planned to use it to aid his struggling business. J.A. 109, 114, 133. In all events, after the November 2005 meeting, petitioner continued to represent respondent through the end of the underlying litigation, and petitioner continued to forbear from collection. Pet. App. 49a; J.A. 58, 67.

In June 2006, petitioner sent respondent a letter renewing its demand for immediate payment of all outstanding fees, stating that it had just learned that respondent had obtained his tax refund many months earlier but had failed to use it to pay petitioner. J.A. 58-60. Respondent refused to pay. Cf. J.A. 62, 69.

More than five years later, petitioner sued respondent in state court for its overdue fees plus interest. C.A. App. A113. In October 2012, the court entered judgment against respondent for $104,179.60. Pet. App. 23a.

b. Three months later, respondent and his wife filed a petition for bankruptcy relief under Chapter 7. Pet. App. 23a. Petitioner initiated an adversary proceeding in the bankruptcy court seeking a determination that the debt arising from petitioner's state-court judgment against respondent was nondischargeable under 11 U.S.C. 523(a)(2)(A). In its amended complaint, petitioner alleged that respondent had made false statements about his tax return at the March and November 2005 meetings; that those statements had induced petitioner to continue its representation and forbear from collecting the existing debt; and that respondent had thereby committed "false pretenses, a false representation, or actual fraud." C.A. App. A42 (quoting 11 U.S.C.

523(a)(2)(A)); see *id.* at A33-A43. Respondent moved to dismiss, arguing that the alleged false statements were "statement[s] respecting [his] * * * financial condition"; that petitioner's objection to discharge therefore was governed by Section 523(a)(2)(B); and that petitioner's objection failed because the alleged false statements had not been "in writing." See Pet. App. 70a (citation omitted).

The bankruptcy court denied respondent's motion to dismiss. Pet. App. 67a-81a. The court construed the phrase "statement respecting the debtor's * * * financial condition" in Section 523(a)(2) to encompass only "communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities." *Id.* at 71a-72a (citation omitted). The court held that, because respondent's alleged statements had involved only a "single asset," they were not "representation[s] 'respecting the debtor's ... financial condition,'" and that petitioner's objection to discharge therefore was governed by Section 523(a)(2)(A). *Id.* at 73a, 76a.

After a two-day trial, the bankruptcy court ruled that respondent's debt to petitioner was nondischargeable under Section 523(a)(2)(A). The court found that respondent had "knowingly misrepresented the amount of the tax refund" at the March 2005 meeting, Pet. App. 55a; that he had made a "knowingly false representation at the November 2005 meeting that he had not yet received the refund," *id.* at 58a; and that he had "committed a false pretense by not disclosing the true amount of the refund," *id.* at 59a. The court further found that petitioner had justifiably relied on those representations in forgoing immediate collection of the outstanding fees, *id.* at 60a-62a, and that this forbearance amounted to an "extension [of credit]" that "made the entire debt nondischargeable," *id.* at 65a-66a; see also *id.* at 79a-81a.

3. The district court affirmed. Pet. App. 20a-44a. Like the bankruptcy court, the district court concluded that, because "[respondent's] statements about his tax refund involved a single asset," they did not constitute statements respecting his financial condition. *Id.* at 30a. The district court also sustained the bankruptcy court's other factual and legal determinations. See *id.* at 31a-44a.

4. The court of appeals reversed. Pet. App. 1a-19a. The court held that respondent's alleged misrepresentations were "'statements respecting [his] financial condition'"; that petitioner's objection to discharge thus was governed by Section 523(a)(2)(B); and that petitioner's objection failed because the false statements had not been made "in writing." *Id.* at 14a (citing 11 U.S.C. 523(a)(2)(B)). The court explained that, "even if 'financial condition' means the sum of all assets and liabilities, it does not follow that the phrase 'statement *respecting* the debtor's . . . financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (citation omitted). Rather, the court found it "[un]ambiguous" that "[a] statement about a single asset" "can 'respect' a debtor's 'financial condition,'" inasmuch as such a statement "'relates to' or 'impacts' a debtor's overall financial condition." *Id.* at 8a-9a, 12a.

Judge Rosenbaum concurred. Pet. App. 14a-19a. Although she viewed the statutory text as ambiguous, *id.* at 15a, she agreed with the panel's interpretation of Section 523(a)(2), *id.* at 19a.

SUMMARY OF ARGUMENT

The text, history, and purpose of 11 U.S.C. 523(a)(2) demonstrate that the phrase "statement respecting the debtor's * * * financial condition" encompasses an affirmative representation about a single asset if that representation is offered as evidence of the debtor's ability to pay.

A. The Bankruptcy Code precludes a debtor from obtaining the discharge of any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" a false representation or other fraud. 11 U.S.C. 523(a)(2). The Code then differentiates between fraudulent conduct that involves a "statement respecting the debtor's or an insider's financial condition," and fraudulent conduct that does not. 11 U.S.C. 523(a)(2)(A). Debts for money, property, services, or credit obtained by a statement respecting the debtor's financial condition are excepted from discharge only where a creditor satisfies the requirements of Section 523(a)(2)(B).

The phrase "statement respecting the debtor's * * * financial condition" is naturally understood to encompass a representation about a debtor's asset that is offered as evidence of ability to pay. A "statement" is an "'embodiment in words of facts or opinions,'" Pet. App. 10a; "respecting" is a term of breadth that means "'relati[ng] to; regarding; [or] concerning,'" *id.* at 8a; and a debtor's "financial condition" is his "overall financial status," *id.* at 7a. An affirmative representation that sheds light on a debtor's financial status is thus a statement "respecting" the debtor's financial condition, just as a representation about a patient's disease is one respecting the patient's medical condition.

Whether the statutory phrase covers a statement about a particular asset depends, however, on the statement's context and purpose. A statement is one "respecting" a debtor's financial condition only if offered as evidence of the debtor's financial circumstances.

B. The statutory lineage of the phrase "statement respecting * * * financial condition" reinforces this understanding. Under prior bankruptcy law dating to 1926, Congress established exceptions to discharge where an individual debtor had procured credit through a "materially false statement in writing respecting his financial condition." That language, both before and after 1960 amendments, was construed by the federal courts of appeals to encompass not only statements that purported to list all of a debtor's assets and liabilities, but also statements that addressed only one or some of a debtor's assets. In adopting substantially the same phrase in the 1978 Bankruptcy Code, Congress is presumed to have been aware of that interpretation and to have intended that the phrase retain its established meaning.

C. This interpretation is also consistent with Congress's apparent purposes. Petitioner emphasizes that Congress has historically enacted bankruptcy laws to protect the "honest but unfortunate debtor" (Pet. Br. 34-36), not to reward fraudulent ones. But the text of Section 523(a)(2) clearly shows that Congress declined to preclude the discharge of debts resulting from "statement[s] respecting * * * financial condition" unless those statements were made in writing. Congress could reasonably choose to provide debtors an additional protection with respect to a category of statements that creditors had previously abused. And when a debtor's statement about a particular asset is offered as evidence of his ability to pay, and the statement actually induces

a creditor to extend value to the debtor, no evident reason exists to treat that statement differently from a statement about the debtor's overall finances that is offered for the same purpose and has the same effect.

ARGUMENT

A. The Statutory Text And Context Show That A Statement About A Single Asset Can Be A "Statement Respecting * * * Financial Condition"

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). This Court's "interpretation of the Bankruptcy Code" therefore starts "'with the language of the statute itself.'" *Ransom* v. *FIA Card Servs., N. A.*, 562 U.S. 61, 69 (2011) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

1. The Bankruptcy Code generally permits an individual debtor in a Chapter 7, 11, 12, or 13 proceeding to obtain a "discharge" of non-excepted debts. See 11 U.S.C. 727, 1141, 1228, 1328. A discharge "operates as an injunction against the commencement or continuation of an action * * * to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2); see also 11 U.S.C. 524(a)(1) and (3).

The Bankruptcy Code provides, however, that "[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt" described in the nineteen paragraphs of Section 523(a). 11 U.S.C. 523(a)(1)-(19). A debt that falls within any of those paragraphs is nondischargeable, and the creditor may continue to pursue payment even if the debtor's other debts are discharged.

See generally 4 *Collier on Bankruptcy* ¶ 523.01 (Richard Levin & Henry J. Sommer, eds., 16th ed. 2015) (*Collier*); 6 *Collier* ¶ 727.15 (2016).

Section 523(a)(2) renders nondischargeable any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" any conduct described in that provision's subparagraphs. 11 U.S.C. 523(a)(2). As relevant here, subparagraph (A) bars discharge of a debt for money, etc., that is obtained by "false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition.*" 11 U.S.C. 523(a)(2)(A) (emphasis added). Subparagraph (B) bars discharge when money, etc., was obtained by "use of a statement in writing[] (i) that is materially false; (ii) *respecting the debtor's or an insider's financial condition*; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive." 11 U.S.C. 523(a)(2)(B) (emphasis added). Section 523(a)(2) thus imposes somewhat more demanding requirements on a creditor who objects to discharge when the pertinent misrepresentation was one "respecting the debtor's * * * financial condition." See p. 3, *supra*.

2. The phrase "statement respecting the debtor's * * * financial condition" is naturally understood to encompass a representation about a debtor's asset that is offered as evidence of ability to pay a debt.[2] That conclusion follows from a proper understanding of the

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[2] References herein to "ability to pay" should also be understood to encompass circumstances in which a creditor seeks to determine

phrase's component parts, cf. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("[A] statute ought * * * to be so construed that * * * no clause, sentence, or word shall be superfluous, void, or insignificant.") (citation omitted), and of the location of that phrase within the Bankruptcy Code, cf. *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omitted).

a. In ordinary usage, a "statement" is "that which is stated; an embodiment in words of facts or opinions; a narrative; recital; report; account." Pet. App. 10a (quoting *Webster's New International Dictionary of the English Language* 2461 (2d ed. 1961) (*Webster's New International Dictionary*)) (brackets omitted). The Bankruptcy Code does not define that term or suggest that, as used in Section 523(a)(2), it has other than its usual meaning. Although the term "financial condition" is used in various bankruptcy provisions,[3] it likewise is not defined by the Code. The parties assert, and the United States agrees, that the term "[f]inancial condition" refers to a person's "overall financial status." *Id.* at 7a; cf. Pet. Br. 23-24; Resp. Br. 25. And all agree that one way to describe a debtor's "'overall financial status'" is to

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a debtor's financial eligibility for some benefit (*e.g.*, need-based assistance), even if the creditor would not have demanded repayment of that benefit absent the debtor's fraud.

[3] With respect to most entity debtors, for example, the Code defines the term "insolvent" to mean the "*financial condition* such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of" certain specified assets. 11 U.S.C. 101(32)(A) (emphasis added); see also 11 U.S.C. 111(c)(2)(E), 363(*l*), 365(b)(2)(A), (b)(3)(A), and (e)(1)(A), 524(g)(4)(A)(ii)(IV), 541(c)(1)(B), 545(1)(E), 727(a)(3), 1103(c)(2), 1106(a)(3), and 1142(a) (all referring to "financial condition").

specify "the sum total of [his] assets and debts." Resp. Br. 25.

Joining the terms "statement" and "financial condition" is the preposition "respecting." That word means "with regard or relation to; regarding; concerning," Pet. App. 8a (quoting *Webster's New International Dictionary* 2123) (brackets omitted), or "[w]ith respect to; with reference to; as regards," *ibid.* (quoting *Oxford English Dictionary* (online ed.)); see Resp. Br. 18 & n.2 (citing other dictionaries). Both "respecting," and the synonyms by which it is defined, have long been understood as terms of breadth.

For example, the Court has given the Property Clause, which authorizes Congress to "make all needful Rules and Regulations *respecting* the Territory or other Property belonging to the United States," U.S. Const. Art. IV, § 3, Cl. 2 (emphasis added), an "expansive reading." *Kleppe* v. *New Mexico*, 426 U.S. 529, 539-540 (1976). And in *Presley* v. *Etowah County Commission*, 502 U.S. 491 (1992), the Court considered whether changes to the structure of two county commissions were "changes '*with respect to* voting' within the meaning of § 5 of the Voting Rights Act of 1965." *Id.* at 494 (quoting 42 U.S.C. 1973c (1988)) (emphasis added). The Court concluded that the changes did not so qualify because they "ha[d] *no direct relation to, or impact on*, voting." *Id.* at 506 (emphasis added).

b. Just as a representation "can 'relate to' or 'concern' someone's health without describing [the person's] entire medical history," a statement "can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." Pet. App. 8a. Because a person's financial condition is the "sum of all assets and liabilities," *ibid.*, a creditor's "knowledge

of one asset or liability" bears on that condition by providing a "step toward knowing whether the debtor is solvent or insolvent," *id.* at 9a. The court of appeals thus was correct to hold that "a statement about a single asset can be a 'statement respecting the debtor's . . . financial condition.'" *Id.* at 14a.

Whether the statutory phrase covers a statement about a particular asset depends on the statement's context and purpose. If the owner of a painting represents that the painting is an original Vermeer, the statement is one "respecting" the owner's "financial condition" if it is made to induce a creditor to extend a loan, because its purpose in that context is to give evidence of the owner's financial ability to repay the loan. See, *e.g.*, *Engler* v. *Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984) (concluding that a "debtor's assertion that he own[ed] certain property free and clear of other liens," made in obtaining a loan, was a "statement respecting his financial condition"). But the same statement would not be one "respecting" the owner's "financial condition" if it was made to induce a potential buyer to pay a high price for the painting. Although the statutory phrase encompasses statements that provide less-than-complete accounts of a debtor's financial condition, it is limited to statements that are made to shed light on what that financial condition is.

Contrary to petitioner's assertion (Br. 46), this understanding does not inject an "additional, subjective layer" into the analysis. Section 523(a)(2) concerns debts that are "obtained by" fraud, meaning debts arising from a creditor's detrimental reliance on a debtor's misrepresentation or fraudulent act. 11 U.S.C. 523(a)(2); see *Field* v. *Mans*, 516 U.S. 59, 66 (1995) (noting that

"some degree of reliance is required to satisfy the element of causation inherent in the phrase 'obtained by'" in Section 523(a)(2)). To establish that reliance element, a creditor opposing discharge under Section 523(a)(2) must explain *why* it viewed the debtor's allegedly false representation as relevant to its decision whether to extend money, property, services, or credit to the debtor. When (as in this case) the creditor persuades a court that it relied on a particular statement as evidence of the debtor's ability to pay, see Pet. App. 61a, no further subjective inquiry is needed to verify that the statement was one "respecting the debtor's * * * financial condition."

3. The contrary interpretation adopted by the Fifth and Tenth Circuits, and the slightly different approach now advocated by petitioner, suffer from significant flaws.

The Fifth and Tenth Circuits have interpreted the phrase "statement respecting * * * financial condition" by relying on the concept of a "financial statement" as used in business parlance. See *In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012) (concluding that the phrase was "meant to embody terms commonly understood in commercial usage"), cert. denied, 568 U.S. 1086 (2013); *In re Joelson*, 427 F.3d 700, 709, 710 (10th Cir. 2005) (stating that "[t]he term 'financial statement' has a strict, established meaning," and "suggesting that the phrase 'statement respecting [the debtor's] financial condition' * * * should be given the same meaning"), cert. denied, 547 U.S. 1163 (2006). Those courts concluded that a debtor's "statement respecting * * * financial condition" includes only those representations that resemble, or are "analogous" to, "balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that

present the debtor or insider's net worth, overall financial health, or equation of assets and liabilities." *Bandi*, 683 F.3d at 677 n.29 (quoting *Joelson*, 427 F.3d at 714).

That cramped construction is unsound. If Congress had intended Section 523(a)(2)(B) to apply only to a debtor's "financial statement," it could easily have so specified, but it instead used language that is both more expansive and less technical. Interpreting that provision to apply only to "financial statements" would be particularly anomalous in the context of the individual debtors to whom Section 523(a) applies, many of whom may not prepare or maintain a comprehensive catalogue of all their assets and liabilities. See 11 U.S.C. 523(a) (applying to "individual" debtors); but cf. p. 2 n.1, *supra*. And if the provision were intended to apply only to "financial statements," it would have been unnecessary to specify under Section 523(a)(2)(B) that such statements must be made "in writing" to render the resulting debts nondischargeable, because formal "financial statements" are almost always in writing. See Pet. App. 11a ("[R]eading the statute to cover only financial statements would render the writing requirement surplusage.").

Courts adopting this narrow interpretation have also relied in part on this Court's prior reference to Section 523(a)(2)(B) as a provision concerned with "false financial statements." *Field*, 516 U.S. at 65, 76. But the Court used that term as a shorthand rather than as a precise description of Section 523(a)(2)(B)'s coverage, which was not at issue in *Field*. And the *Field* Court elsewhere alluded to Section 523(a)(2)(B) as embracing a false representation concerning a debtor's "bank balance," *id.* at 76, which describes a single asset.

Petitioner's slightly different approach also lacks merit. Petitioner posits that, in addition to covering

comprehensive recitations of assets and liabilities, the phrase "statement respecting the debtor's * * * financial condition" encompasses informal representations that characterize a debtor's bottom line, including "holistic" statements like "Don't worry, I am above water" or "I am solvent" (Pet. Br. 19, 29).[4] Petitioner maintains, however, that a statement about a single asset categorically does not qualify, even when a creditor relies on it as evidence of the debtor's ability to pay.

Petitioner's approach would give the statute a haphazard quality that lacks a strong textual foundation and would further no evident congressional purpose. Under petitioner's interpretation, the phrase "statement respecting * * * financial condition" would apparently cover both (a) an itemized list of all of a debtor's assets and liabilities, even if that list does not articulate a bottom-line conclusion as to the debtor's overall financial condition; and (b) a bottom-line conclusion about the debtor's overall financial condition, even if it identifies no specific assets or liabilities. Yet the phrase would exclude a partial roster of assets and/or liabilities, even when it was offered and relied upon as evidence of the debtor's financial circumstances. And it is entirely unclear why Congress would require vague representations like "I am in good financial shape" (Pet. Br. 28) to be in writing to render a debt nondischargeable, while treating a false oral statement like "I have $500,000 of

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[4] In an unpublished opinion, the Fifth Circuit recently interpreted its prior decision in *Bandi* to cover such holistic statements. See *In re Haler*, 708 Fed. Appx. 836, 840–841 (2017) (holding that "oral representations" that debtor was in "very fine legally [sic] financial shape" and had "plenty of cash to operate [the] business" were statements respecting financial condition) (brackets in original).

equity in my home" as a sufficient ground for precluding discharge.

4. Petitioner's counterarguments are unpersuasive. Petitioner suggests (Br. 27-28, 31-33) that the term "respecting" means "about," "concerning," or "with reference to," but *not* "related to." Yet petitioner fails to identify any difference in meaning among those terms. A statement made by a debtor about a particular asset, made to show his ability to pay a debt, is also naturally described as a statement *about*, *concerning*, or *with reference to* his financial condition. See, *e.g.*, *In re Long*, 774 F.2d 875, 877 & n.1 (8th Cir. 1985) (allegation that debtor "obtained excessive loans by misrepresenting the value of [his company's] inventory" was one that "concerns the financial condition of [the company] and is thus governed by [Section] 523(a)(2)(B)"). Nor is it significant that Congress used the phrase "relating to" elsewhere in the Bankruptcy Code. Cf. Pet. Br. 29. Congress "is permitted to use synonyms," *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001), and both dictionaries and judicial opinions have treated "respecting" and "relating to" as essentially synonymous. See p. 13, *supra*.

There is likewise no substantial basis for petitioner's concern (Br. 31) that "little will be left covered by Section 523(a)(2)(A)'s general rule" if its interpretation is not adopted. Statements respecting a debtor's finances are of course common in credit transactions, where evidence bearing on the likelihood of repayment is central to a creditor's decision whether to consummate the transaction. But Section 523(a)(2)(A) is not limited to credit transactions; it applies more broadly to debts for "money, property, [and] services" that the debtor obtained through fraud or misrepresentation.

For example, if a seller misrepresents the value of the goods or services he sells to a buyer, and if the buyer later obtains a fraud judgment against the seller, the buyer may object to discharge of the resulting debt under Section 523(a)(2)(A) if the seller later declares bankruptcy. Cf. *Grogan* v. *Garner*, 498 U.S. 279, 280-281, 290 (1991). Federal agencies participating as creditors in bankruptcy proceedings often oppose discharge under Section 523(a)(2)(A) in these circumstances. See, *e.g.*, *In re Bocchino*, 794 F.3d 376, 380-383 (3d Cir. 2015) (SEC judgment against debtor who worked as stockbroker and who misrepresented the value of the investments he sold was nondischargeable); *United States* v. *Spicer*, 57 F.3d 1152, 1155-1161 (D.C. Cir. 1995) (debtor's promise to pay a monetary settlement of the government's False Claims Act claims was nondischargeable), cert. denied, 516 U.S. 1043 (1996); *In re Austin*, 138 B.R. 898, 911-915 (Bankr. N.D. Ill. 1992) (FTC's judgment against art dealer for misrepresentations about authenticity and value of artwork was nondischargeable).

Even as to credit transactions, Section 523(a)(2)(A) applies if a debtor's misrepresentation relates to something other than his financial circumstances, such as his purpose in obtaining a loan, the intended ultimate recipient of the borrowed funds, the debtor's qualifications or licenses, or the status of the project being financed. Pet. App. 12a; see, *e.g.*, *In re Carter*, 539 B.R. 753, 757-759 (Bankr. M.D. La. 2015) (debt nondischargeable where debtors represented that they needed loan for home improvements and instead used proceeds to open restaurant); *In re Eversole*, 110 B.R. 318, 323-325 (Bankr. S.D. Ohio 1990) (debt nondischargeable where

debtor requested loan to pay project-related architectural and engineering fees and instead used proceeds to satisfy personal debts); Resp. Br. 34-35 (collecting examples from Fourth Circuit).

In any event, regardless of how this Court resolves the question presented here, Section 523(a)(2)(A) will apply when a debt does not arise from an affirmative representation by the debtor. Section 523(a)(2)(A) "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs. Inc.* v. *Ritz*, 136 S. Ct. 1581, 1586 (2016) (interpreting "actual fraud"). And a fraud committed through "omission" can also give rise to a debt that is nondischargeable under Section 523(a)(2)(A). Pet. App. 11a. That is true even if the omitted information pertains to the debtor's financial condition. For example, the Social Security Administration (SSA) and other federal agencies frequently invoke Section 523(a)(2)(A) in opposing discharge of debts arising from the overpayment of benefits to persons who fail to notify the government of relevant changes in their financial condition (*e.g.*, increased income from work) despite having a legal duty to do so. See, *e.g.*, *In re Tucker*, 539 B.R. 861, 867-868 (Bankr. D. Idaho 2015); *In re Hall*, 515 B.R. 515, 520-521 (Bankr. S.D. W. Va. 2014); cf. *In re Drummond*, 530 B.R. 707, 710 & n.3 (Bankr. E.D. Ark. 2015) (agreeing that such objections are governed by Section 523(a)(2)(A) rather than by Section 523(a)(2)(B)).[5]

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[5] To receive Social Security benefits, a person must submit a written application that, *inter alia*, describes the applicant's income and assets. See, *e.g.*, 20 C.F.R. 416.203 (Supplemental Security Income).

B. The Statutory Lineage Of The Phrase "Statement Respecting * * * Financial Condition" Reinforces The Conclusion That The Phrase Encompasses Single-Asset Statements

As relevant here, Section 523(a)(2) took on substantially its current form when the Bankruptcy Code was enacted in 1978. Provisions containing similar language, however, existed under prior bankruptcy law. The courts' interpretations of those provisions, and the events leading up to Section 523(a)(2)'s enactment, reinforce the conclusion that a statement about a single asset may constitute a "statement respecting the debtor's * * * financial condition."

1. Before the Code was enacted, federal bankruptcy practice was governed by the 1898 Bankruptcy Act, ch. 541, 30 Stat. 544, as amended. That Act contained two sections of particular relevance here. Section 14 described circumstances in which a discharge would be denied entirely to a debtor. Section 17 enumerated specific categories of debts that were nondischargeable even if the debtor was otherwise eligible for a discharge. See *Field*, 516 U.S. at 64 (identifying these provisions as the "obvious antecedents" of Section 523(a)(2)).

a. As amended in 1903, Section 14 of the Bankruptcy Act denied discharge entirely to a debtor who had "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." Act of Feb. 5, 1903, ch. 487, § 4, 32 Stat. 797-798. Thus, at

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Recipients are then obliged to notify SSA of any change in that information, see, *e.g.*, 20 C.F.R. 404.1588, 416.988, and SSA relies on such notice to effectuate necessary benefits changes in a timely manner.

that time, a debtor who made *written* misrepresentations to obtain property *on credit* could not obtain discharge of *any* of his debts. Section 17 applied more broadly to "liabilities for obtaining property by false pretenses or false representations," but it imposed the more limited consequence of precluding discharge of the particular debt that arose from such conduct. *Id.* § 5, 32 Stat. 798.

In the ensuing years, courts interpreted Section 14 to prevent a debtor's discharge only if the debtor's written misstatements had been made to a creditor directly (or, after a 1910 amendment, to a creditor's "representative," see Act of June 25, 1910, ch. 412, § 6, 36 Stat. 839-840). Section 14 thus did not extend to debtor misstatements made to third parties, including credit agencies on whose reports creditors often relied. See, *e.g.*, *J. W. Ould Co.* v. *Davis*, 246 F. 228, 231 (4th Cir. 1917). In 1926, to address this perceived gap in the statute, Congress amended Section 14 to bar discharge entirely for any debtor who had "obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a *materially false statement in writing respecting his financial condition.*" Act of May 27, 1926, ch. 406, § 6, 44 Stat. 663-664 (emphasis added).

Congress subsequently concluded, however, that this provision had led to significant creditor abuse. "[U]nscrupulous lenders" came to "condone[], or even encourage[], the issuance of statements omitting debts with the deliberate intention of obtaining a false agreement for use in the event that the borrower subsequently goes into bankruptcy." H.R. Rep. No. 1111, 86th Cong., 1st Sess. 2 (1959) (*1959 House Report*). Section 14 gave

such creditors a "powerful weapon with which to intimidate a debtor into entering into an agreement in which the creditor agrees not to oppose the [debtor's] discharge in return for the debtor's agreement to pay the debt in full after discharge." *Ibid.* Some legislators proposed to respond to this abuse by entirely deleting the clause of Section 14 that barred discharge for any debtor who had made a "false statement in writing respecting his financial condition." See, *e.g.*, H.R. Rep. No. 785, 85th Cong., 1st Sess. 4 (1957) (reporting a bill that would have taken that step).

Congress ultimately decided, however, to adopt an intermediate approach. In 1960, Congress amended Section 14's categorical discharge bar for debtors who had made false written statements respecting their financial condition in order to limit that bar to debtors "engaged in business." Act of July 12, 1960, Pub. L. No. 86-621, § 1, 74 Stat. 408. With respect to nonbusiness debtors, Congress determined that the particular debts arising from such false statements should remain nondischargeable, even though other debts could be discharged. To achieve that result, Congress simultaneously amended Section 17 to preclude discharge of, *inter alia*, "liabilities * * * for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon *a materially false statement in writing respecting* [*the debtor's*] *financial condition* made or published or caused to be made or published in any manner whatsoever with intent to deceive." *Id.* § 2, 74 Stat. 409 (emphasis added); see *1959 House Report* 3 (describing purpose of this Section 17 amendment).

b. Both before and after the 1960 amendments, courts construed the phrase "materially false statement in writing respecting [a debtor's] financial condition" to

encompass not only statements that purported to list all of a debtor's assets and liabilities, but also statements that addressed only one or some of a debtor's assets. In rejecting a debtor's argument that his false written statement about "accounts which ha[d] no existence whatsoever" was not a statement respecting his financial condition, the Sixth Circuit observed that "[n]o cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities." *Albinak* v. *Kuhn*, 149 F.2d 108, 110 (1945); cf., *e.g.*, *In re Weiner*, 103 F.2d 421, 423 (2d Cir. 1939) (false statement about debtor asset pledged as collateral was statement respecting financial condition).

Decisions in the three decades following *Albinak* remained consistent with the understanding that a statement about a single asset could qualify as a statement respecting financial condition. See, *e.g.*, *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356, 1357-1358 (9th Cir.) (per curiam) (holding that "appellants' recordation of [a false] deed * * * for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition"), cert. denied, 434 U.S. 832 (1977); *Shainman* v. *Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967) ("A written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation."); *Scott* v. *Smith*, 232 F.2d 188, 190 (9th Cir. 1956) ("The bankrupt's implied representation * * * that he then had some ownership or control of property * * * available for hypothecation by him, amounts to a statement 'respecting his financial condition.'").

c. In 1970, Congress established a commission to study and recommend changes to the federal bankruptcy system. In its final report, that commission concluded that, even after the 1960 amendments described above, creditors had continued to abuse the "false statement in writing respecting * * * financial condition" provision then set forth in Section 17. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc., 93d Cong., 1st Sess. Pt. I, at 176 (1973). The commission concluded that "the abuses and the harmful effects [to debtors] far outweigh[ed] the benefit to creditors by this exception." *Ibid.* The commission recommended not only that Congress eliminate the specific exception for consumer debts resulting from false written statements respecting financial condition, but also that Congress make Section 17's more general fraud exception inapplicable to consumer debtors. See H.R. 31, 94th Cong., § 4-506(a)(2) (1975) (commission-sponsored bill) (proposing to apply Section 17's fraud exceptions to discharge only to "debt[s] other than a consumer debt").

Congress did not adopt the commission's recommendation to make Section 17 inapplicable to consumer debts. Congress also decided generally to "continue[] the exception to discharge based on a false statement in writing concerning the debtor's financial condition." H.R. Rep. No. 595, 95th Cong., 1st Sess. 129 (1977) (*1977 House Report*). To "balance the scales more fairly," however, Congress undertook "some modifications" to that exception, including by requiring "reasonable reliance" in lieu of lesser reliance and by requiring certain unsuccessful creditors to pay "costs, attorney's fees, and damages to a consumer debtor." *Id.* at 129-131; see

11 U.S.C. 523(a)(2)(B)(iii) and (d). Congress also specified that the general discharge exception for fraud would apply only to frauds committed "other than" through a "statement[] respecting the debtor's * * * financial condition," 11 U.S.C. 523(a)(2)(A), and that frauds committed through use of such a statement would instead be governed by a distinct provision that required proof of a "writing," 11 U.S.C. 523(a)(2)(B). These Code provisions retained the words "statement respecting * * * financial condition" that had appeared in prior bankruptcy law.

2. a. The sequence of events described above reinforces the conclusion that the phrase "statement respecting * * * financial condition" in current Section 523(a)(2) encompasses statements about particular assets. Multiple appellate courts had previously construed the same phrase to cover such statements. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). It is therefore logical to presume that, when it incorporated the phrase into the current Bankruptcy Code in substantially the same form, Congress "inten[ded] to incorporate its * * * judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); cf., *e.g.*, *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 590 (2010) (even if the interpretation of prior statutory language by "three Federal Courts of Appeals" did not definitively "'settle[]'" its meaning, "there [was] no reason to suppose that Congress disagreed with those interpretations when it enacted" a new statute containing the same language).

b. The inferences that petitioner would draw from this history are unwarranted. Petitioner identifies (Br. 43-45 & n.5) a number of pre-1978 decisions that applied the Bankruptcy Act to comprehensive financial representations and that petitioner characterizes as reflecting the "mine run" of cases. None of those decisions held, however, that *only* a comprehensive representation could qualify as a "false statement in writing respecting [a debtor's] financial condition." Indeed, the suggestion that these decisions explored the full range of covered misstatements is inconsistent with petitioner's own theory, under which the phrase would encompass highly generalized representations of financial soundness (*e.g.*, "I am above water") that differ from the more detailed representations involved in the cases that petitioner invokes. See pp. 16-17, *supra*.

Petitioner also emphasizes (Br. 21, 45) that, before 1978, a broad interpretation of the phrase "materially false statement in writing respecting [the debtor's] financial condition" favored *creditors*, by excepting more debts and debtors from discharge. Under current law, by contrast, a broad interpretation of the phrase "statement respecting the debtor's * * * financial condition" favors *debtors*, since debts obtained through false statements of that nature will be nondischargeable only if the statement was in writing and the creditor's reliance was reasonable. See 11 U.S.C. 523(a)(2)(B). Petitioner finds no "indication in the legislative record that Congress had any major shift like this in mind." Pet. Br. 36.

It may well be uncommon for Congress to incorporate preexisting statutory language into a new provision that is intended to achieve a significantly different policy result. But Congress incontrovertibly took that step when it enacted Section 523(a)(2). Congress's decision

to afford meaningfully different treatment to "statement[s] respecting * * * financial condition" is apparent from the face of the statute itself, which expressly excludes such statements from Section 523(a)(2)(A) and then specifically addresses them in the next subparagraph. And the contrast between the two subparagraphs makes clear that the nondischargeability of a debt incurred through fraud will be *more difficult* to establish if the misrepresentation concerns the debtor's "financial condition." Those legislative choices provide no sound basis for rejecting the usual inference that preexisting statutory language incorporated into an amended law retains its prior meaning.

Finally, petitioner emphasizes (Br. 20, 28, 36-38, 40) the *1977 House Report*'s reference to one abusive practice through which creditors had induced the creation of incomplete statements in order to render the creditors' debts nondischargeable. *1977 House Report* 130-131. Petitioner implies that Congress enacted Section 523(a)(2)(B) to address only that particular abusive practice. As respondent explains (Br. 49-50), however, it is not apparent that even petitioner's interpretation would capture the practice that the House committee had identified, which apparently involved debt statements rather than "holistic snapshot[s]" or comprehensive lists of all assets and liabilities (Pet. Br. 29). Moreover, the abusive practice identified in the *1977 House Report* was one that had long been associated with written statements. The requirement that statements respecting financial condition be made "in writing" to render a debt nondischargeable, 11 U.S.C. 523(a)(2)(B), thus cannot reasonably be understood to have been enacted for the purpose of redressing that particular abuse.

C. The Court Of Appeals' Interpretation Of Section 523(a)(2) Is Consistent With Congress's Apparent Purposes

Petitioner asserts that, "[u]nder the Eleventh Circuit's interpretation, fraudsters can swindle innocent victims for money, property, or services by lying about their finances, then discharge the resulting debt in bankruptcy, just so long as they do so orally." Pet. Br. 35. Petitioner asserts (*e.g.*, Br. 5-6, 19-20, 33, 34-36) that this result is inconsistent with the overarching principle that the bankruptcy laws exist to protect the "honest but unfortunate debtor." *Cohen* v. *de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). That policy concern provides no sound basis for refusing to give Section 523(a)(2) the reading that follows most naturally from its text and history.

1. The text of Section 523(a)(2) unambiguously directs that, for purposes of the fraud exception to the discharge of debts in bankruptcy, false "statement[s] respecting the debtor's * * * financial condition" will be treated differently from other fraudulent misrepresentations. In particular, a creditor who claims to have relied on a false "statement respecting the debtor's * * * financial condition" can invoke Section 523(a)(2) as a basis for opposing discharge only if the false statement was made in writing. Congress's reasons for imposing that requirement are not entirely clear. The 1978 Bankruptcy Code's legislative history suggests, however, that Congress's distinct treatment of this class of false statements rests at least in part on "the peculiar potential of financial statements to be misused not just by debtors, but by creditors who know their bankruptcy law." *Field*, 516 U.S. at 76.

Petitioner acknowledges (Br. 28, 35) that, if a debtor's false oral description of his assets and liabilities is sufficiently comprehensive, Section 523(a)(2)'s bar on discharge does not apply. In determining whether the Eleventh Circuit's decision is consistent with Congress's policy judgments, the most immediate point of reference is the specific policy judgment, reflected in Section 523(a)(2) itself, that a false oral "statement respecting * * * financial condition" will not preclude discharge of the resulting debt—not the more general policy that bankruptcy relief ordinarily should be available only to honest but unfortunate debtors. Within the particular statutory context in which the phrase "statement respecting the debtor's * * * financial condition" appears, petitioner has identified no sound policy rationale for distinguishing comprehensive oral catalogues of assets and liabilities from oral representations concerning the value of a particular asset.

Section 523(a)(2)'s discharge bar applies only if the creditor actually relied on the debtor's false statement in deciding to provide money or other things of value. See *Field*, 516 U.S. at 66; p. 3, *supra*. Thus, while many statements by debtors about specific assets may be irrelevant to creditors' financial decisions, Section 523(a)(2) is concerned only with statements that actually affect creditor behavior. Here, for example, a partner in the petitioner law firm "testified that [petitioner] agreed to continue its representation of [respondent] and forego collection activities in reliance upon [respondent's] representations regarding the tax refund." Pet. App. 61a. When a debtor's statement about a particular asset is offered as evidence of his ability to pay, and the statement actually induces a creditor to provide money, property, services, or credit, there is no evident

reason to treat that statement differently than when a statement about the debtor's overall finances is offered for the same purpose and has the same effect.

The distinct treatment of "statement[s] respecting the debtor's * * * financial condition" that is mandated by Section 523(a)(2) "gives creditors an incentive to create writings before the fact," which generates "reliable evidence" for future litigation. Pet. App. 13a. And the decision whether to rely on an oral statement about a counterparty's finances, or instead to insist on confirming that statement in writing, is within the creditor's own control. To be sure, with respect to misrepresentations *other than* those "respecting the debtor's * * * financial condition," Congress declined to limit Section 523(a)(2)'s exception to discharge to debts arising from written misrepresentations. But given Congress's apparent view that statements about debtors' financial circumstances had previously been used to facilitate abusive creditor practices (see pp. 22-25, *supra*), Congress could reasonably choose to provide debtors additional protection for that class of statements.

2. Petitioner's interpretation of Section 523(a)(2) does not appear to reflect any coherent understanding of Congress's policy goals. There is no evident reason why Congress would require vague general representations (*e.g.*, "I am in good financial shape") to be put in writing, while omitting such a requirement for representations that are far more detailed and precise (*e.g.*, "I pledge as collateral my boat, which is currently worth $50,000 and is not subject to any superior security interest"). And to the extent petitioner's interpretation of "statement respecting * * * financial condition" is intended to identify the universe of statements on which

creditors customarily rely to discern a debtor's creditworthiness or ability to pay, its interpretation is significantly underinclusive.

Many consumer lenders do not require comprehensive financial information before deciding whether to lend. See, *e.g.*, 82 Fed. Reg. 54,472, 54,480-54,481 (Nov. 17, 2017) (noting that "payday" lenders typically require information only about an individual's income and personal deposit accounts, and not about a borrower's other financial obligations or credit score). Indeed, many creditors rely principally on the value of a particular asset—for instance, property pledged or offered as collateral, see *Joelson*, 427 F.3d at 703—in deciding whether a debtor's financial circumstances justify the transaction. And in any event, Section 523(a)(2) is concerned only with false statements that induce reliance and thereby affect creditor behavior. See pp. 14-15, 30, *supra*.

Petitioner's interpretation also would yield different results depending on whether a debtor's financial representations are made piecemeal or instead all at once. Under petitioner's approach, if a creditor asks the debtor for a comprehensive statement of his financial condition, and the debtor misrepresents his salary within that statement, the creditor would need to satisfy the requirements of Section 523(a)(2)(B) in order to prevent discharge of the debt. But if the creditor had previously obtained a comprehensive statement of the debtor's financial condition, and requested an update only as to the debtor's salary, petitioner would apparently view that update as a statement about a "single asset" and therefore not one respecting the debtor's financial condition. Here, for example, petitioner may have refrained from requesting any comprehensive statement

of respondent's assets and liabilities at the March and November 2005 meetings only because it was already generally familiar with respondent's overall financial circumstances. See J.A. 42-43, 68, 71-72, 79-81, 85. An interpretation that gave decisive weight to this distinction would both produce arbitrary results and encourage creditor gamesmanship.[6]

3. Reasonable people can debate the wisdom of Congress's decision to allow discharge of debts for money or property obtained through false oral "statement[s] respecting the debtor's * * * financial condition." Indeed, a contrary approach would serve the interests of the United States in its capacity as the Nation's largest creditor. But once that basic policy judgment is taken as given, there is no sound reason to view it as inapplicable to the misrepresentation at issue in this case. Respect for Congress's policy determinations thus reinforces the most natural reading of the statutory text.

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[6] The fact that this case concerns "a statement about a single asset," as petitioner emphasizes (*e.g.*, Br. 18, 46), may also reflect petitioner's litigation choices as much as it does respondent's conduct. In bringing suit in bankruptcy court, petitioner alleged that respondent not only had lied about his tax refund, but also had falsely stated that he had "no [other] monies available" with which to pay petitioner when in fact he owned retirement assets that could have been liquidated for that purpose. C.A. App. A41; see also J.A. 66-67 (same). Yet petitioner elected not to "sue[] upon" this alleged broader misrepresentation about respondent's financial condition, C.A. App. A41, and instead focused its complaint solely on respondent's statements about the tax refund.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

11 U.S.C. 523 provides in pertinent part:

Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * * * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the

relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

* * * * *

No. 16-1215

IN THE

Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

—v.—

R. SCOTT APPLING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS RICHARD AARON, LAURA BARTELL, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, VINCENT BUCCOLA, JESSICA GABEL CINO, LINDA COCO, LAURA NAPOLI COORDES, ROBERT D'AGOSTINO, IRINA FOX, BRUCE GROHSGAL, GEORGE KUNEY, LOIS LUPICA, NANCY B. RAPOPORT, KEITH SHARFMAN, MICHAEL SOUSA, LAURA M. SPITZ, AND ADRIAN WALTERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Amici are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] The Amici are particularly concerned by Petitioner's misinterpretation of § 523(a)(2) of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, (the "Code"), which wrongly maintains that a false *oral* statement describing a single asset gives rise to a non-dischargeable debt. As Amici will

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, including Amici Curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk, pursuant to Rule 37.6.

[2] The Amici are the following law professors who teach at the schools indicated next to their names: Richard Aaron, S.J. Quinney College of Law, University of Utah; Laura Bartell, Wayne State University Law School; Jagdeep S. Bhandari, Wake Forest University School of Law; Susan Block-Lieb, Fordham University College of Law; Vincent Buccola, The Wharton School, University of Pennsylvania; Jessica Gabel Cino, Georgia State University; Linda Coco, Barry University; Laura Napoli Coordes, Arizona State University; Robert D'Agostino, John Marshall Law School; Irina Fox, Creighton University School of Law; Bruce Grohsgal, Widener University Delaware School of Law; George Kuney, University of Tennessee College of Law; Lois Lupica, University of Maine School of Law; Nancy B. Rapoport, Carmen Turner, Gordon Professor of Law UNLV; Keith Sharfman, St. John's University School of Law; Michael Sousa, University of Denver College of Law; Laura M. Spitz, Cornell University; and Adrian Walters, Chicago-Kent College of Law.

show, Congress understood that § 523(a)(2) simply re-enacted statutory language already having a completely settled understanding that a statement about a single asset was a "statement respecting financial condition" which must be in writing in order to give rise to a non-dischargeable debt. Petitioner, however, overlooks the binding significance of the prior Legislative and Judicial history which gave that meaning to § 523(a)(2). Next, Petitioner eviscerates the protections of § 523(a)(2)(B) that were carefully crafted by Congress to prevent wrongful determinations of non-dischargeability (as may have happened in this case). Finally, Petitioner propounds a statutory construction that leads to absurd results, including that an oral lie about one asset would be non-dischargeable, but an oral lie about all assets and all liabilities comprising a balance sheet would be dischargeable.

Amici also submit, as an independent reason to uphold the court below, that even if, *arguendo*, Petitioner were correct that a statement respecting financial condition must refer to overall financial condition, Respondent's statements actually *were* statements about his overall financial condition because they amounted to a claim that he was solvent in the equity sense; *i.e.*, able to pay his debts.

SUMMARY OF ARGUMENT

A. The Controversy

At stake in this case is the dischargeability in bankruptcy of a debt owed by Respondent, H. Scott Appling ("Appling"). Appling incurred a debt to Petitioner, a law firm, for its services. Those services were supposedly obtained by means of false *oral* statements made to Petitioner by Appling regarding a single asset of Appling's, namely the amount and timing of a federal tax refund.

In a nutshell, 11 U.S.C. § 523(a)(2)(B) requires that statements "respecting the debtor's . . . financial condition" must (among other conditions) take the form of a "statement in writing" in order to give rise to a non-dischargeable debt.[3] Petitioner's core

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[3] 11 U.S.C. § 523(a)(2) provides in relevant part:

§ 523 Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing –

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

contention is that a statement about a single asset is *not* a statement "respecting the debtor's financial condition." Petitioner erroneously contends that the term "financial condition" only applies to one's overall financial condition, i.e., a balance sheet setting forth the sum of one's assets and liabilities. Pet'r Br. 26. Therefore, in Petitioner's mistaken view, § 523(a)(2)(B) is inapplicable, and Appling's allegedly false statement about a single asset need not have been in writing to be the basis of a non-dischargeable debt under § 523(a)(2)(A).

Respondent contends, as ruled by the court below, *Appling v. Lamar, Archer & Cofrin, LLP (In re Appling)*, 848 F.3d 953, 958-59 (11th Cir. 2017) (hereinafter, the *Opinion Below*), that a statement about a single asset is, as a matter of plain meaning, a statement "respecting", (that is "involving", "concerning", or "relating to") financial condition. Therefore, for the resulting debt to be non-dischargeable, such a statement must be a "statement in writing" as required by § 523(a)(2)(B). Hence, because Respondent's statement was merely oral, and not in writing, his debt is dischargeable. *Id.*, at 961.

B. Reasons to Uphold the Court Below

Amici do not intend to present an analysis of the plain meaning of "respecting" that duplicates arguments advanced by Respondent or that were

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(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; . . .

given as a *ratio decidendi* by the court below. *See*, S. Ct. Rule 37. Amici respectfully submit that while such arguments are dispositive, there are additional reasons to rule in favor of Respondent as follows:

First, § 523(a)(2) merely re-enacted language from the prior Bankruptcy Act as to which there was a settled Congressional and Judicial understanding that a statement about a single asset is a statement respecting financial condition which must be in writing to establish a non-dischargeable debt. Under principles laid down by this Court, that settled understanding governs the meaning and operation of § 523(a)(2).

Second, Petitioner's position avoids Petitioner having to prove the elements of § 523(a)(2)(B), which Congress carefully crafted to avoid mistaken determinations of non-dischargeability. The requirement of a writing, with which Petitioner would dispense, is designed to avoid exactly what happened here: a determination based on subjective evaluations of the credibility of witnesses recounting oral conversations almost ten (10) years after the fact. Further, Petitioner never proved (and on its interpretation of the statute would escape *ever* having to prove) the other requirements of § 523(a)(2)(B): materiality, reasonable reliance, and intent to deceive. Moreover, importantly, Petitioner's repetitive denigration of Mr. Appling's honesty does *not* change the requirements of the statute.

Third, Petitioner's overall reading of § 523(a)(2) leads to absurd outcomes as to which debts are non-dischargeable, including that a debt arising from an oral lie about a single asset is not

dischargeable, whereas the debt arising from an oral lie about *all* assets and liabilities would be dischargeable. Rejecting Petitioner's fundamental misinterpretation of the statute not only means that Appling's debt is dischargeable, but leads to a clean, coherent meaning of the statute that avoids bizarre outcomes described herein.

Lastly, Respondent's alleged statement about a tax refund was directly a statement *of* (not merely "respecting") his financial condition, because that statement addressed his ability to repay the indebtedness to the Petitioner and amounted to a declaration of his overall solvency in the equity sense. Petitioner cannot credibly dispute that it understood Respondent's statement in exactly that way when it extended credit to him. Therefore, even on Petitioner's misinterpretation of § 523(a)(2)(A) and (B), Appling's debt is dischargeable because he did not make any statement in writing.

ARGUMENT

POINT I

SECTION 523(a)(2) MERELY RE-ENACTED A STATUTE WHICH HAD A CONGRESSIONALLY AND JUDICIALLY SETTLED UNDERSTANDING THAT A STATEMENT REGARDING A SINGLE ASSET IS A STATEMENT RESPECTING FINANCIAL CONDITION, AND IT MUST BE IN WRITING TO GIVE RISE TO A NON-DISCHARGEABLE DEBT

11 U.S.C. § 523(a)(2), enacted in 1978 as part of the Bankruptcy Code, Pub.L. No. 95-598, 11

U.S.C. § 101 *et seq.*, re-enacted provisions in the Bankruptcy Act of 1898, as amended. Case law addressing those provisions was settled that a statement about a single asset is a statement respecting financial condition, and it must be in writing for there to be a non-dischargeable debt. In amending the Bankruptcy Act, Congress clearly had that understanding. That understanding governs § 523(a)(2).

A. Early History: The Act of 1867, the Act of 1898 and the 1903 Amendment

The bankruptcy legislation of 1867 designated fraudulent debt as unaffected by a discharge. *See*, Act of Mar. 2, 1867, ch. 176, § 29, 14 Stat. 517 (1867) (repealed) ("Act of 1867"). At common law frauds could be committed by purely oral, as well as written, statements, *see generally*, Restatement (Second) of Torts, § 525, cmt. b (1977), and the Act of 1867 drew no distinction between oral and written frauds.

The Bankruptcy Act of 1898 (the "Bankruptcy Act"), as enacted in that year, addressed debts arising from frauds in Section 17, former 11 U.S.C. § 35, and provided for the non-dischargeability of certain particular debts, in relevant part, as follows:

> A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations . . .; or (4) were created by his fraud, embezzlement . . . .

Once again, as in the 1867 Act, there was no distinction in the 1898 Act between written and oral statements.

In 1903, the Bankruptcy Act was amended to provide four grounds within Section 14b of that Act upon which a court could deny discharge of all debts, not merely of particular debts. Included in these new grounds was obtaining credit by a materially false *writing*. Act of February 5, 1903, Pub. L. No. 57-62, ch. 487, § 4, 32 Stat. 797-98 (1903) (repealed) (denying discharge to a debtor who "(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit . . ."). This was the first reference to "false statement in writing" in the Bankruptcy Act, and is an obvious precursor to 11 U.S.C. § 523(a)(2)(B).

B. The 1926 Amendment: The Phrase "Materially False Statement in Writing . . . Respecting Financial Condition" First Appears in the Context of Barring Discharge of *All* Debts

In 1926, Congress amended what was then Section 14b(3) of the Bankruptcy Act[4] to create an outright bar to the discharge of *all* debts if the bankrupt had "[o]btained money or property or credit . . . by making or publishing . . . a materially false statement in writing respecting his financial condition." Former 11 U.S.C. § 32b(3) created by the Act of May 27, 1926, Pub.

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[4] The Bankruptcy Act of 1938, frequently called the Chandler Act, Pub. L. No. 75-696, subsequently caused Section 14b to be renumbered as Section 14c.

L. No. 69-301, ch. 6 § 6, 44 Stat. 662, 663-64 (repealed). This amendment was the first statutory usage of the phrase "respecting financial condition." It also had the effect of making false written statements of financial condition a basis for denial of discharge of *all* debts, not just the dischargeability of the specific debt.

C. The 1960 Amendment: Congress Confines "False Statement in Writing Respecting Financial Condition" to the Dischargeability of *Single* Debts

By 1960, Congress had come to believe that complete denial of discharge as provided by the 1926 amendment "was too severe a penalty in the case of an individual noncommercial bankrupt." H.R. Rep. No. 86-4346, at 2 (1959). Congress also expressed concern that unscrupulous lenders were inviting false financial statements through the use of forms easily designed to cause omissions, *Id.*, but this was not its sole concern, as Petitioner erroneously seems to imply. *See*, Pet'r Br. 10.

As a result of those concerns, Congress in 1960 decided to eliminate false *written* financial statements regarding a debtor's financial condition as a ground for the denial of a discharge for non-business individual debtors and amended § 14c(3) to that effect. However, as *1A Collier on Bankruptcy*, ¶17.01 [3.1] at 1578 (14th Ed. 1978) notes, in the wake of that amendment, "it [then] became important to make certain that the obtaining of money, property or credit by use of such [written] false statements [still] resulted in a non-dischargeable debt."

Congress achieved that aim by adding the following basis for non-dischargeability of a debt to § 17(2) in its 1960 amendment:

> [O]r for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement *in writing* respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive . . . .

Act of Jul. 12, 1960, Pub. L. No. 86-621, Sec. 2, § 17(2), 7 Stat. 408, 409 (1960) (repealed) (emphasis added).

The substance of the 1960 amendment, therefore, was to remove from § 14c(3)[5] false written statements as a predicate for denial of a general discharge, and to import false written statements into § 17a(2) as an exception to dischargeability of only those specific debts predicated on such written statements.

D. Case Law Uniformly Treated Statements about Single Assets as Statements Respecting Financial Condition

Section 17a(2) of the Bankruptcy Act was the direct precursor to § 523(a)(2) of the Bankruptcy Code, both of which use the term, "statement in writing respecting . . . financial condition". Accordingly, case law developed between 1926 and 1960 under § 17a(2), and its predecessor, namely § 14(c)(3), illuminates statutory meaning.

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[5] I.e., former § 14(b) but renumbered by the Chandler Act. *See* note 4, *supra*.

Cases during that era uniformly held that a statement regarding a single asset was a statement about financial condition.

Cases decided under § 14c(3), before its language was imported into § 17a(2) by the 1960 Amendment, held that a statement regarding a single asset is a statement about financial condition. *See, Scott v. Smith*, 232 F.2d 188, 190 (9th Cir. 1956) (implied representation of control over property is a statement "reflecting his financial condition"); *Albinak v. Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945) ("[N]o cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities."); *In re Licht*, 45 F.2d 844, 846 (E.D.N.Y. 1930) (§ 14b(3) would apply if the bankrupt had made a materially false statement about "any . . . part" of his property, giving a single real estate asset as an example).

Moreover, courts applying § 17a(2) following the 1960 amendment likewise understood that the language had been imported from § 14, and therefore continued to hold that a materially false statement about a single asset constituted a statement about financial condition. *See, Shainman v. Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967) ("[S]tatement purporting to set forth the value of a major asset, inventory, is a statement respecting the financial condition . . ."); *Tenn v. First Hawaiian Bank*, 549 F.2d 1356, 1357-58 (9th Cir.) (*per curiam*) (recording of a false deed to obtain credit on the basis of an asset not owned is a false statement of financial condition).

The case law appears to be uniform and settled. No contrary authority was located through diligent research.

E. The Settled Case Law that Statements About Single Assets are "Statements Respecting Financial Condition" Governs § 523(a)(2) of the Bankruptcy Code Which Merely Re-Enacted § 17a(2) of the Bankruptcy Act

Section 523(a)(2) re-enacted § 17a(2) of the Bankruptcy Act, using identical language. The legislative history notes that § 523(a)(2) "continues the exception to discharge based on a false statement in writing concerning the debtor's financial condition." *See*, H.R. Rep. No. 95-595, at 129 (1977). The prior history of that term clearly shows that statements about single assets were understood as statements "respecting a debtor's financial condition."

That understanding carried over into the Bankruptcy Code when it was enacted in 1978. It is a general principle that when Congress re-enacts legislation, it adopts settled judicial interpretations. As this Court has held:

> When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.

Bragdon v. Abbott, 524 U.S. 624, 645 (1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress

is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ."); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Kelly v. Robinson*, 479 U.S. 36, 46-7 (1986).

When it enacted § 523, Congress did nothing to indicate it was changing the law; on the contrary, the legislative history noted above indicates Congress was *continuing* the law. Therefore, for purposes of § 523(a)(2), a statement regarding a single asset is a statement respecting financial condition that must be in writing to be non-dischargeable.

Moreover, it is a general principle that practices under the Act carry through under the Code unless clearly changed by the Code. *See, Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (stating that basic bankruptcy practices should not be eroded absent "[c]lear indication that Congress intended such a departure"); *accord, Hall v. United States*, 566 U.S. 506, 518 (2012); *Hamilton v. Lanning*, 560 U.S. 505, 516 (2010); *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 454 (2007); *Lamie v. United States Trustee*, 540 U.S. 526, 539 (2004).

There is no indication whatsoever that Congress intended any departure. The only indication is the opposite, that Congress

intended no departure. Therefore, Respondent should prevail in this matter.

POINT II

PETITIONER WOULD ESCAPE HAVING TO PROVE THE ELEMENTS OF § 523(a)(2)(B), WHICH CONGRESS CARE-FULLY CRAFTED SO AS TO AVOID MISTAKEN DETERMINATIONS OF NON-DISCHARGEABILITY (AS MAY WELL HAVE HAPPENED IN THE PRESENT CASE)

A. Petitioner Would Render Nugatory the Explicit Statutory Requirements to Establish Non-Dischargeability

This Court has long held, both under the Bankruptcy Act of 1898, and under the current Bankruptcy Code, that exceptions to discharge should be "confined to those plainly expressed." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) ("*Kawaauhau*") (Code case); *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("*Gleason*") (Act case). *See also*, *Neal v. Clark*, 95 U.S. 704, 709 (1878) ("*Neal*") (Act case) (noting the "liberal spirit which pervades the entire bankruptcy system"). Thus, expansive readings which would render debts non-dischargeable when that outcome is not "plainly expressed" are to be avoided. To hold otherwise invites a brutal consequence for the debtor: "[I]n many instances, failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

Congress has, however, "plainly expressed" in § 523(a)(2)(B) *exactly* what is needed to render non-dischargeable a debt arising from a false statement respecting a debtor's financial condition: (i) the statement must be in writing; (ii) it must be materially false; (iii) the creditor must reasonably rely on it; and (iv) the debtor must have published it with intent to deceive. Petitioner in this case would dispense with proving any of those requirements, thereby vastly expanding the universe of non-dischargeable debts in direct contravention of the principles set forth by this Court in the *Kawaauhau*, *Gleason*, and *Neal* cases, *supra*.

B. Statements Should be in Writing to Eliminate Doubt as to What was Actually Said – And There is Plenty of Doubt in This Case

A basic rationale for requiring that a statement respecting financial condition be in writing is to establish with certainty what statement was in fact made. That rationale was widely understood contemporaneously with the passage of the 1898 Bankruptcy Act:

> In the case of an oral statement, there is always more or less doubt as to the representation made, and it would cause much conflict of testimony and consume much time of [bankruptcy] referees and courts, with no certainty of a correct result, if such statements were made grounds for denying the discharge.

Henry Newton, *United States Bankruptcy Law of 1898*, 9 Yale L.J. 287, 293-9 (1900). As the court below recognized, the Bankruptcy Code "imposes

different requirements of proof for different kinds of statements. A statement respecting a debtor's financial condition must be in writing, which helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." *Opinion Below*, 848 F.3d at 960.

In this case, Lamar, a law firm, could easily have asked for a statement in writing, thereby eliminating any legal question about the need for a writing while also creating clear and reliable evidence as to what was said. Instead, there was a trial that produced a morass of conflicting testimony as to what Respondent supposedly said. Walter Gordon, a witness for Petitioner testified that "[Respondent] represented . . . he was going to get a substantial [tax] refund . . . in excess of $100,000, and that he would pledge it as soon as it came in, that . . . he would be able to pay the fees out of that refund."[6] JA 54-55. Appling, however, testified: ". . . what I told Mr. Gordon and Mr. Lamar [is] that I didn't know what I'm getting back, there's a potential I get $100,000; if I get $100,000 I should be able to pay your bill." *Id.*, at 115. To further complicate the "he said, he said" nature of the evidence, the relevant discussions about which testimony was being given occurred nearly *ten* years earlier.[7]

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[6] Remarkably, Lamar, a lawyer, made no contemporaneous notes of his and Mr. Gordon's meeting with Appling, and did not send Appling a confirmatory letter. JA 81-82.

[7] Trial testimony was given on September 18, 2014, JA 31; meetings at which false statements were supposedly made occurred in March, 2005, JA 34, and November, 2005, JA 36.

The trial court resolved the conflicting testimony based partly on the demeanor of the witnesses. *See, In re Appling*, 527 B.R. 545, 553 (M.D. Ga., 2015) ("Having heard the evidence, observed the demeanor of the witnesses, and reviewed the documents introduced, the court finds . . .").

Amici acknowledge that traditionally, the law has regarded a witness's demeanor as probative of honesty. *See, e.g., Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 495-96 (1951) (demeanor traditionally believed to furnish "valuable clues"). Lower courts have occasionally been more forceful. *See, e.g., Gov't of Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967) (demeanor "of utmost importance" in determining witness credibility).

However, modern sociological and psychological research suggests that demeanor is not a reliable indicator of whether a witness is telling the truth:

> [T]he experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging when someone is lying. There is no evidence that facial behavior is of any benefit; some evidence suggests that observation of facial behavior diminishes the accuracy of lie detection. . . . With respect to body cues, there is no persuasive evidence to support the hypothesis that lying is accompanied by distinctive body behavior that others can discern.

Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1088 (1991).

Of course, a trial judge has to resolve conflicting testimony on some basis. But if all a judge has to go on is demeanor, a conscientious judge can, in complete good faith, get it wrong by sincerely disbelieving the right party or sincerely believing the wrong party.

Another factor that affects the reliability of testimony is lapse of time. Memories fade, but the human tendency to fill in gaps is well documented:

> Biological memory serves us well, but it is *highly* selective and fallible. We do not remember all of our conscious experiences; we mis-remember many of our experiences; and memory fades over time. Even what is objectively memorable can be forgotten.

Anita L. Allen, *Dredging Up The Past: Lifelogging, Memory and Surveillance*, 75 U. Chi. L. Rev. 47, 50 (2008) (emphasis added).

Thus, a witness can easily give false testimony in the sincere belief that he is being truthful because he honestly believes his faulty memory to be accurate, or perhaps has unconsciously filled in erroneous details. A conscientious judge acting in good faith might well be persuaded by testimony given sincerely but that is nevertheless wrong.

Even though that may well have happened here, whether it did is not the question before the Court. But what *is* before the Court is a question the resolution of which will have a profound impact on the reliability of future non-dischargeability determinations. A ruling in

favor of Respondent that requires any statement about financial condition to be in writing reduces the risk of sincerely decided but wrong outcomes in cases where the only evidence is conflicting oral testimony.

C. Petitioner Never Proved the Elements of § 523(a)(2)(B)

Petitioner's interpretation of § 523(a)(2) deftly sidesteps any inquiry into its own behavior and avoids having to prove the elements in § 523(a)(2)(B) required to establish the non-dischargeability of a debt, elements which it might very well not be able to prove. Amici fully understand that the inquiry in this case turns solely on whether Respondent's statement had to be in writing, but Amici are deeply concerned that a ruling for Petitioner would have the untoward effect of facilitating unscrupulous or careless creditors in obtaining future determinations of non-dischargeability.

Beyond there being no statement in writing in this case, the absence of other elements of § 523(a)(2)(B) is conspicuous. Suppose, *arguendo*, that Respondent had put a false statement in writing. There would still be an important question of fact in this case whether Petitioner "reasonably relied" as required by that provision. After all, Petitioner is a law firm to whom statements were being made about a tax refund. Some due diligence would certainly seem in order – examples include asking to see Respondent's tax return and seeking to understand the substantive legal basis for a refund claim. Instead, Mr. Lamar explicitly acknowledged that he did not seek an assignment of the refund,

stating, "I simply trusted my client, Mr. Appling." JA 82. In the circumstances of this case, there is a very real question whether the simplicity of trust was reasonable.

Notably, while § 523(a)(2)(B) imposes an express requirement that the creditor "reasonably relied" on a false statement, this Court has imposed a standard of "justifiable reliance" under § 523(a)(2)(A). *Field v. Mans*, 516 U.S. 73, 77 (1995). Amici submit that the record does not even support that there was justifiable reliance by Lamar, much less the higher standard of "reasonable reliance" imposed by 11 U.S.C. § 523(a)(2)(B). As this Court said, "Naifs may recover at common law and in bankruptcy, but lots of creditors are not at all naïve." *Id.*, at 76. It is fair to assume that Lamar, a law firm, is not at all naïve.

D. Petitioner's Umbrage Does Not Override the Statute

Petitioner repeatedly attacks Respondent as a liar. Pet'r Br. 2 and *passim*. Petitioner repeatedly invokes the claim that Respondent's alleged lies make him unworthy to discharge his debt to Petitioner because the benefits of bankruptcy are reserved for the honest debtor. *Id.*, at 5 and *passim*.

In the first place, Respondent's honesty or dishonesty has no bearing on the issue now before the Court, namely whether a statement by a debtor about a single asset is "a statement respecting the debtor's financial condition." Beyond that, however, Petitioner's sanctimonious attack obscures a fundamental flaw in Petitioner's position. The flaw is that § 523(a)(2)(B) sets up

numerous conditions, *all* of which must be met to deny dischargeability. Falsity and intent to deceive are only two of them, but they are not sufficient to satisfy § 523(a)(2)(B). The whole point and operation of that statute is to require *more* than a lie. The reality is that some dishonesty does not lead to a loss of discharge. "Thus, a debt incurred by an oral fraudulent statement respecting the debtor's financial condition can be discharged." *Opinion Below*, 848 F.3d at 957.

Sainthood is not a requirement to qualify for the benefits of bankruptcy, and puritanical mantras about "honest" debtors cannot override the express provisions of the statute Congress chose to enact. As the court below put it, "[a] distaste for dishonest debtors does not empower judges to disregard the text of the statute." *Id.*, at 960.

Moreover, Amici urge that application of § 523(a)(2)(B) to this case best carries out this Court's mandate not to extend exceptions to discharge beyond those "plainly expressed." If Congress had intended that oral statements about a single asset were to be non-dischargeable under § 523(a)(2), despite its uniform requirement of a writing throughout its bankruptcy legislation, "it would have spoken more clearly to that effect." *Staples v. United States*, 511 U.S. 600, 620 (1994). After making its intent clear to require a writing under the Bankruptcy Act's provisions, which it carried into § 523(a)(2), Congress would not have intended to quietly smuggle into § 523(a)(2)(A) a provision to deny the discharge of the debt arising from an oral

false statement about the debtor's financial condition.

Here, not only was Respondent's alleged statement *not* in writing, but none of the other elements of § 523(a)(2)(B) were proven, or even the subject of findings of fact, except falsity (and intent to deceive, but only with respect to some statements). Therefore, in light of the pre-Code statutory history discussed above, and in light of the uniform case law that statements about a single asset are statements respecting financial condition, and considering uniform case law *against* expansive constructions of non-dischargeability provisions, it is clear that Respondent's debt is dischargeable, and the decision below should accordingly be affirmed.

POINT III

PETITIONER'S READING OF § 523(a)(2) LEADS TO ABSURD CONSEQUENCES

A. The Absurd Consequences

Petitioner's essential contention is that a false oral statement concerning a single asset is *not* a statement respecting the debtor's financial condition; therefore, Petitioner concludes, such a statement is *not* subject to § 523(a)(2)(B) and does *not* have to be in writing to create a non-dischargeable debt. Pet'r Br. 22. But if, as Petitioner urges, a statement about a single asset is not a statement "respecting financial condition," then absurd consequences follow.

It is fundamental that statutes should not be construed in a way that leads to absurd or perverse outcomes. Assuming, *arguendo*, the Petitioner's reading is the literal, plain meaning

of the statute, then nevertheless that literal, plain meaning is still to be avoided if it leads to absurd results. *See, Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *cf., Babbit v. Sweet Home Chapter of Comtys for a Greater Or.*, 515 U.S. 687, 701 (1995) (terms to be defined so as not to cause absurd results). Accordingly, Petitioner's construction of § 523(a)(2) should be rejected for the reason that it generates absurd results described below.

First, under Petitioner's reading of § 523(a)(2)(A), an oral misrepresentation about the worth of a single asset (a little lie) creates a non-dischargeable debt, but an oral misrepresentation of overall net worth falsely describing all assets and all liabilities (a big lie) *would* result in a dischargeable debt. This is so because even Petitioner has to concede that an oral lie about *overall* net worth would not be non-dischargeable under § 523(a)(2)(B) since there is no writing. But as Petitioner concedes, a lie about *overall* net worth is a statement of financial condition, and thus such statement is outside the scope of § 523(a)(2)(A) as well. It is, however, absurd that a small oral lie creates a non-dischargeable obligation and a big oral lie results in a dischargeable obligation.

Second, if Petitioner's interpretation were correct that statements about a single asset are not statements respecting financial condition, then even a written material false misrepresentation about a single asset on which a creditor reasonably relies would not fall within § 523(a)(2)(B). But that creates an absurd carve-out from the plain and literal language of § 523(a)(2)(B) which explicitly encompasses written statements. It is

absurd that Congress would put some written statements under the purview of § 523(a)(2)(A) when *only* subsection (B) refers to "use of a statement in writing." As this Court has repeatedly stated, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also, Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same) (citations omitted); *Clay v. United States*, 537 U.S. 522, 523, 528-39 (2003) (same) (citations omitted). Petitioner's interpretation violates that canon and also leads to an absurdity. Its construction of § 523(a)(2)(B) should be rejected for this reason alone.

B. Petitioner's Reading Unreconciles Subsections (A) and (B)

It is Petitioner's foundational misconstruction of the statute that generates absurd results, and the misconstruction is the failure to harmonize sub-subsections (A) and (B). Petitioner views some statements relevant to financial condition as being outside the purview of sub-subsection (B) and instead captured by subsection (A). Yet, it offers no principled basis for determining which statements are subject to sub-subsection (A) and which are subject to sub-subsection (B). Is a statement of *all* assets, but which is silent as to liabilities governed by (A) or (B)? What about a statement of *all* liabilities, but which is silent

as to assets? Or a statement about *only* material assets or about *only* material liabilities?[8]

Neither Petitioner, nor the legislative history, nor case law resolves those questions. What *does* resolve those questions is adhering to the plain meaning of the statute. If a statement "respects" (that it involves, relates to, concerns or pertains to) financial condition, then it is governed by sub-subsection (B) and must be in writing to give rise to a non-dischargeable debt, irrespective of whether that statement is about one asset, some assets, most assets, material assets, or all assets. Unless the statute is read according to its plain text, one inevitably becomes enmeshed in creating distinctions and dividing lines as to which Congress gave no indication that it ever intended, and which unnecessarily tangle what is actually a very simple, workable and straightforward statutory scheme that limits non-dischargeability for statements about any aspect of financial condition to false written statements meeting the requirements of § 523(a)(2)(B). As this Court stated in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000):

> A court must . . . interpret [a] statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole." (citations omitted)

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[8] Petitioner baldly asserts that its construction of the statute "will not create any line-drawing problems." Pet'r Br. 21. That assertion is simply incorrect.

Petitioner's construction of § 523(a)(2) is the opposite of that interpretive principle. Petitioner sets subsections (A) and (B) against each other, which alone is a reason to reject Petitioner's reading of that statute. Petitioner does this by saying that subsection (A) impliedly covers oral statements respecting financial condition, even though the plain meaning is crystal clear that statements respecting financial condition must be in writing to give rise to a non-dischargeable debt. Petitioner accomplishes this maneuver by urging that statements about a single asset are not statements of financial condition. Had Congress wanted § 523(a)(2)(A) to operate as an exception to § 523(a)(2)(B), it would presumably have done so expressly and could have done so easily. *See, Russello v. United States, supra,* 464 U.S. at 23. However, "[t]he short answer is that Congress did not write the statute that way." *See, United States v. Naftalin,* 441 U.S. 768, 773 (1979). Indeed, Congress actually wrote the statute the opposite way, with subparagraph (B) operating as the exception to subparagraph (A). As this Court has stated, "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . is not to construe the Act but to amend it." *Fedorenko v. United States,* 449 U.S. 490, 513 (1981).

To hold that subparagraph (A), a general provision, prevails over subparagraph (B), a specific provision, so as to allow the nondischargeability of a debt arising from an oral statement about the debtor's financial condition, would also violate the canon of construction that a specific provision is presumed

to prevail over a general provision absent a clear contrary indication by Congress, which does not exist in this case. *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Amici respectfully urge this Court to apply the statute as written, and not as contorted by Petitioner. The decision below should be affirmed.

POINT IV

APPLING'S ALLEGED STATEMENTS ABOUT A TAX REFUND WERE DIRECTLY STATEMENTS *OF* (NOT MERELY RESPECTING) HIS FINANCIAL CONDITION BECAUSE THEY ASSERTED HE WAS SOLVENT IN THE EQUITY SENSE AND COULD PAY HIS DEBTS; THEREFORE, THE STATEMENTS WERE REQUIRED BY § 523(a)(2)(B) TO BE IN WRITING TO GIVE RISE TO A NON-DISCHARGEABLE DEBT

The Court below rightly held that a statement about a single asset is one "respecting" (that is, involving, concerning, or relating to) "financial condition." Not only is that true based on plain meaning as reflected in dictionary definitions, but it also gives the word "respecting" a linguistic role. *See, Opinion Below*, 848 F.3d at 958 ("We must not read the word 'respecting' out of the statute."). It is a basic canon of statutory construction that statutes are to be read so as to give every word meaning. *See, Hibbs v. Wynn*,

542 U.S. 88, 101 (2004); *Corley v. United States*, 556 U.S. 303, 314 (2009).

Amici thus believe the Court below reached the correct result, but offer the following additional analysis. Amici submit that "financial condition," as used in § 523(a)(2)(B), is not confined to balance sheet solvency. It extends to solvency in the equity sense as well; that is, it extends to the debtor's ability to repay its debts as they come due. The use of "solvency" to include solvency in the equity sense is well recognized in case law in many contexts. *See, e.g., Zurich Specialties London, Ltd. v. Bickerstaff, Whately, Ryan & Burkhalter*, 425 F. App'x 554, 556 (9th Cir., 2011) ("[L]egal definition of insolvency describes an ongoing process in which an entity is unable to meet its liabilities as they mature.").

Ironically, even authorities on which Petitioner relies implicitly accept that insolvency may be defined in the equity sense as well as in the balance sheet sense. The *Bandi* case, on which Petitioner relied in its Petition for Certiorari at 19 (but which it has chosen not to cite again in its Merits Brief), stated in the opinion: "A representation that one owns a particular residence or a particular commercial property says nothing about the overall financial condition of the person making the representation *or of the ability to repay debt.*" *In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012), *cert. denied*, 568 U.S. 1086 (2013) (emphasis added). Thus, even according to Petitioner's authorities, statements about the

ability to repay debt would count as statements of financial condition.[9]

Indeed, in the wake of the Fifth Circuit's decision in *Bandi*, even the Fifth Circuit itself has very recently held that an oral statement by a debtor that it had "plenty of cash to operate [its] business" was a statement of financial condition. *Matter of Haler*, 708 F. App'x 836, 840 (5th Cir. 2017). Moreover, the Court went on to hold that "[t]hese oral representations were statement[s] respecting ... financial condition and thus did not render the debt non-dischargeable under § 523(a)(2)(A). *Id.*, at 841. (ellipsis in original).

It is true that the Bankruptcy Code defines "insolvent" in terms of balance sheet assets and liabilities. *See*, 11 U.S.C. § 101(32)(A) and (B) although insolvency for municipalities is defined in the equity sense. *See* § 101(32)(C). However, those definitions can only apply to a particular provision of the Bankruptcy Code if the word "insolvent" is actually used in that provision. However, the word "insolvent" does not appear in § 523(a)(2)(A) or (B). There is simply nothing about the Bankruptcy Code's definition of "insolvent" being framed as a balance sheet test in § 101(32)(A) and (B) which requires that the term "financial condition" in § 523(a)(2)(B) be understood as restricted to a balance sheet definition of solvency. Similarly,

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[9] Whether the statement at issue in the *Bandi* case was a statement of financial condition is beside the point; what matters is its implicit recognition of the principle. In the instant case, it is beyond doubt that Appling's alleged statements about the tax refund were directly statements about his ability to repay debt.

there is simply nothing about the Bankruptcy Code's definition of "insolvency" being framed in the equity sense in § 101(32)(C) that precludes applying "solvency" in the equity sense to the concept of "financial condition" as used in § 523(a)(2).

Notably, the Bankruptcy Code does not impose a balance sheet test for filing bankruptcy. *See generally*, 11 U.S.C. §§ 109, 301; *cf.*, *In re Johns-Manville Corp.*, 36 B.R. 727, 732 (S.D.N.Y. 1984), *leave to appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984), *reh'g. denied*, 39 B.R. 998 (S.D.N.Y. 1984), *mandamus denied*, 749 F.2d 3 (2d Cir. 1984) (no insolvency requirement to file Chapter 7 or Chapter 11 bankruptcy). Indeed, many individuals and entities file for bankruptcy relief because of their inability to pay their debts as they become due. Consequently, solvency either in the balance sheet sense or equity sense, is meaningful with respect to the debtor's financial condition for the purpose of § 523(a)(2). Congress therefore used a broad term, "financial condition" that encompasses insolvent in both senses. It did not restrict "solvency" to a balance sheet test for purposes of § 523(a)(2).

Because "financial condition" includes solvency in the equity sense, it follows that statements about assets are direct statements of (not just "respecting") financial condition. When the import of the statement is having the wherewithal to repay debt, it is an assertion of solvency in the equity sense. And that is *exactly* what Respondent is accused of asserting in the instant case. His purported assertions that he would be receiving a $100,000 tax refund, allegedly made both before and after he received a tax refund, were assertions that he was solvent

in the equity sense, i.e., able to pay his debt.[10] In the circumstance, that was not just a statement "respecting" financial condition, it was a statement *of* Respondent's financial condition.

Accordingly, and as an alternative ground to the ruling below, Respondent's alleged misrepresentation is of his financial condition (not merely "respecting" it) and falls squarely within the ambit of § 523(a)(2)(B) without need to explicate the term "respecting." And, since the alleged misrepresentation was not in writing, the debt is dischargeable.

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[10] His alleged lie that he had not yet received a tax refund when he had actually received it still falls into this category; it still amounts to a claim that he can pay his debt. Notably, in yet another example of conflicting testimony, Appling testified that he truthfully revealed that he had actually received the tax refund. JA 114.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondents' Merits Brief, Amici respectfully submit that the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 16-1215

IN THE
Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership, which includes about 300,000 companies, is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Both parties consented to the filing of this brief by email from their counsel of record.

SUMMARY OF ARGUMENT

The Bankruptcy Code generally bars debtors who gain property through fraud from discharging the resulting debt. 11 U.S.C. § 523(a)(2)(A) has a limited exception to that rule: a debt for property obtained by a false "statement respecting the debtor's . . . financial condition" *is* dischargeable. Most of the Courts of Appeals to address the question have held that the exception only applies to statements about a debtor's overall financial health. But not the Eleventh Circuit, which held that the phrase "statement *respecting* . . . financial condition" covers any statement *relating to* a debtor's financial status, even including a statement about a single asset. That was error for three reasons.

I. First, the text, history, and background principles of the Bankruptcy Code show that a "statement respecting . . . financial condition" must be a statement about the debtor's financial condition as a whole. As the Eleventh Circuit acknowledged and the Bankruptcy Code elsewhere confirms, "financial condition" refers to a financial gestalt like net worth, not individual items on a balance sheet. The Eleventh Circuit nevertheless concluded that the term "respecting" had such a broad meaning that § 523(a)(2)(A) encompasses any statement that "relates to" financial condition. But "respecting" also means "about," and that is the only meaning that makes sense of the rest of the statute, the narrow evil it was meant to prevent, and the longstanding principle excluding dishonest debtors from the benefits of bankruptcy.

II. Congress also would not casually invade the traditional state responsibility over contract law. But

that is what the Eleventh Circuit did by fashioning a national super-Statute of Frauds with a de facto writing requirement on all consumer credit contracts.

III. Last, Congress would not lightly saddle American small businesses with a novel mandate to create and store mountains of paperwork containing sensitive customer information. Yet that is what the Eleventh Circuit's rule does. In particular, the lower court demanded that creditors secure written statements from customers if any credit decisions depend on oral statements that relate to the customer's financial condition in some way. That would be a major shift in the way business is done in America, and many small businesses would be unable to comply. As a result, the Eleventh Circuit's rule would magnify the already significant credit risks for small business. Because nothing in the text, history, or policy of the Bankruptcy Code suggests that Congress intended to impose such burdens on small business, this Court should reverse the Eleventh Circuit's unfortunate decision below.

ARGUMENT

I. The Eleventh Circuit's fraudster-friendly extension of Section 523(a)(2)(A) to misrepresentations about a single asset is unfaithful to the text, history, and background principles of the Bankruptcy Code.

The traditional tools of statutory construction reveal that § 523(a)(2)(A) creates a narrow exception for misstatements about a debtor's overall financial condition—not a broad exemption for any falsehood that relates in some way to financial status. Judge

Owen's opinion in *In re Bandi*, 683 F.3d 671 (5th Cir. 2012), and Judge Ebel's opinion in *In re Joelson*, 427 F.3d 700 (10th Cir. 2005), illustrate the correct way to use those tools to interpret "a statement respecting . . . financial condition."

Text. Starting with the text, the term "financial condition" has a plain meaning "commonly understood in commercial usage": it refers to a debtor's overall financial status, not a particular line on a balance sheet. *Bandi*, 683 F.3d at 676. The Bankruptcy Code's use of "financial condition" to define "insolvency" cements that meaning. In particular, "'insolvent' *is* a 'financial condition' . . . defined by reference to debts as compared to property." *Id.*; *see* 11 U.S.C. § 101(32)(A) (defining "insolvent" as the "financial condition such that the sum of [an] entity's debts is greater than all of such entity's property"). That use of the term "financial condition" to refer to "the entity's net worth" suggests that it "also relates to a debtor's net worth or overall financial condition" in § 523(a)(2)(A). *Joelson*, 427 F.3d at 707; *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("'[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.'" (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

Even the Eleventh Circuit had to acknowledge that "'[f]inancial condition' likely means one's overall financial status." Pet. App. 7a. Yet the lower court inverted that meaning by interpreting "statement[s] *respecting* . . . financial condition" to include falsehoods that merely "*relate to*" financial condition in some way, including (but by no means limited to)

statements about particular assets divorced from the debtor's overall financial picture. *Id.* at 8a-9a (emphases added). In essence, the Eleventh Circuit plucked the broadest dictionary definition of "respecting," *id.* at 9a, without considering whether the broadest definition fit the statutory context.

But "respecting" does not always mean "relating to"; it can simply mean "about." *See, e.g., Respecting, Webster's New Twentieth Century Dictionary Unabridged* (2d ed. 1977); *see also* BIO 14 (acknowledging this definition). And so it does here. That meaning is far more consistent with the agreed meaning of "financial condition," because it limits the exempt statements to those that actually address a debtor's overall financial picture.

To see why "respecting" must mean "about" rather than "relating to" in this context, consider a request for a "cookbook respecting sandwiches." One might expect a volume on the Reuben or bánh mì. But no one would anticipate a tome on *mustard*. Yet, by the Eleventh Circuit's logic, that would fit the bill because mustard "relates to" sandwiches, in that it is sometimes a sandwich ingredient. The Eleventh Circuit's interpretation of "statement respecting . . . financial condition" makes no more sense of its text than a mustard book would in this example.

History. The history behind § 523(a)(2)(A) confirms that the Eleventh Circuit's open-ended interpretation is incorrect. The roots of § 523(a)(2)(A) stretch back over a hundred years, and Congress has, over time, modified the Bankruptcy Code's anti-fraud provisions to seek a fairer balance between the interests of creditors and debtors. *See Field v. Mans*,

516 U.S. 59, 64–65, 76–77 (1995). Shortly after the turn of the century, for instance, federal bankruptcy law barred discharge of *all* debts if a debtor had obtained *any* property by way of certain materially false statements. Act of Feb. 5, 1903, ch. 487, 32 Stat. 797, 797–98, §§ 4, 17(a)(2). Seeking to mitigate the harsh consequences of the complete nondischargeability rule (precluding the discharge of *all* debts, if the debtor procured *any* single debt by fraud)—especially in the face of unscrupulous activity by creditors—Congress in 1960 amended that provision to provide that only those *particular* debts incurred through a debtor's false written statement "respecting his financial condition" were nondischargeable. *Field*, 516 U.S. at 65; Act of July 12, 1960, Pub.L. No. 86–621, 74 Stat. 408, 409, § 2. The legislative history suggests that Congress intended the provision to cover more comprehensive statements akin to financial statements. *Joelson*, 427 F.3d at 709. In fact, the Senate Report on the bill states that its purpose was "to limit the use of *false financial statements* as a bar to discharge in bankruptcy." S. Rep. No. 86-1688, at 1 (1960) *as reprinted in* 1960 U.S.C.C.A.N. 2954, 2954 (emphasis added).

The 1960 amendment did not accomplish all of Congress's aims. Predatory lenders still sometimes encouraged false financial statements from "their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76–77; *see also Swint v. Robins Fed. Credit Union*, 415 F.2d 179, 184 (5th Cir. 1969) ("[Creditor] induced a sworn statement that the earlier itemized list was complete when it knew it was not. The affidavit being knowingly false was a trap which afforded a perfect

paper record on which to circumvent discharge if the debtor defaulted."). The 1978 amendment thus targeted this practice, providing an additional hurdle for creditors to clear. *See Field*, 516 U.S. at 66 (recognizing that the 1978 amendment "added a new element of reasonable reliance" to the written fraud provision). The 1978 amendment also added the exception at issue here to the oral fraud provision, so that statements about a debtor's overall financial condition would fall under the heightened requirements applicable to written fraud.

Background principles of bankruptcy. The interpretation of § 523(a)(2)(A) must also account for the longstanding background principles embedded in the Bankruptcy Code: a fresh start for the honest borrower without a free ride for the dishonest debtor. "[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). "But," as the Court has also emphasized, "in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor." *Id.* at 286–87; *see also, e.g.*, *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, . . . but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life."); *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549,

554–55 (1915) ("It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."). That policy against offering the benefits of bankruptcy to dishonest debtors echoes the ancient maxim: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong." *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

Extending § 523(a)(2)(A) to any statement that relates in some manner to a debtor's financial status would turn that policy on its head. "[V]irtually every statement by a debtor that induces the delivery of goods or services on credit relates to his ability to pay." *Joelson*, 427 F.3d at 713. Thus, the uncabined interpretation adopted below "would permit many dishonest debtors to avoid the consequences of oral fraud." *Id.* It would "take a very clear provision to convince anyone of anything so odd." *Field*, 516 U.S. at 68.

In fact, the Eleventh Circuit's rule would not only benefit many more dishonest borrowers, but also borrowers who are *more dishonest*. It may be understandable for a debtor giving an oral account of his financial status to "simply forget a particular asset or liability when listing all of [his] assets and liabilities." *Joelson*, 427 F.3d at 707. Section 523(a)(2) appropriately extends "more leeway (and more dischargeability) to a debtor who errs in stating his or her *overall position* orally." *Id.* (emphasis added). But a borrower "who makes a specific oral

misrepresentation as to a particular asset" has little excuse, since he "had a particular subject called specifically to mind." *Id.*

Because the longstanding policy of the Bankruptcy Code supports the same interpretation as the plain text and the history of § 523(a)(2)(A), this Court should reject the Eleventh Circuit's contrary rule.

II. The Eleventh Circuit transformed Section 523(a)(2)(A) into a national super-Statute of Frauds in derogation of traditional state responsibility.

This Court should also reject the Eleventh Circuit's rule because it implausibly interprets the statute as invading a core area of traditional state responsibility. As petitioner has explained, the Eleventh Circuit's conclusion that Congress intended its construction to encourage creditors to insist upon statements in writing—and thereby achieve some unstated "reliability" or "evidentiary" objective—is contradicted by the text of the statute and other indicia of Congress's intent. But there is another, perhaps even more fundamental problem with this interpretation.

Until the decision below, each State had the prerogative to decide for itself when a writing requirement for creditors was appropriate, and when it was likely to cause more mischief than it prevented. *See Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1182 (7th Cir. 1991) (under *Erie*, "the administration of the [S]tatute [of Frauds] [is] . . . a matter of primary concern to the states rather than to the federal government"). Generally, most States

found the writing requirement to be more trouble than it's worth, except in a handful of enumerated situations covered by a Statute of Frauds. *See* Restatement (Second) of Contracts § 110 (1981) (identifying the five core agreements subject to Statutes of Frauds as: (1) executorships; (2) suretyship contracts; (3) contracts in consideration of marriage; (4) contracts for the sale of an interest in land; and (5) contracts not capable of performance within one year); *see also* Pet. App. 13a (recognizing that the Statute of Frauds only "*sometimes* requires that proof be in writing as a prerequisite to a claim for relief" (emphasis added)). Even then, state courts construed those circumstances narrowly.[2]

The decision below casually flattened all that. Explicitly invoking the Statute of Frauds, the

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[2] *See, e.g.*, *In re Marriage of Takusagawa*, 166 P.3d 440, 446 (Kan. Ct. App. 2007) ("The clear trend over the years has been toward a narrowing interpretation of the statute of frauds."); *Birdwell v. Psimer*, 151 S.W.3d 916, 919 (Tenn. Ct. App. 2004) ("[The one-year] provision within the statute of frauds is to be construed very narrowly by the courts, since the courts should generally try to give effect to a contract rather than defeat it"); *Sherman v. Haines*, 652 N.E.2d 698, 700 (Ohio 1995) ("For over a century, the 'not to be performed within one year' provision of the Statute of Frauds, in Ohio and elsewhere, has been given a literal and narrow construction."); *White Lighting Co. v. Wolfson*, 438 P.2d 345, 351 (Cal. 1968) (refusing to apply the statute of frauds to an entire contract because doing so would "transgress the policy of restricting the application of the statute of frauds exclusively to those situations which are precisely covered by its language"); *Steen v. Kirkpatrick*, 36 So. 140, 141 (Miss. 1904) (stating that a "rule of strict construction applies to that clause of the statute of frauds relating to agreements 'made upon consideration of marriage,' so that, to fall within that clause, the agreement must be strictly in consideration of marriage, and not merely made in contemplation of marriage").

Eleventh Circuit thought its interpretation would "giv[e] creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision." Pet. App. 13a. But as a practical matter, the Eleventh Circuit's writing requirement would govern just about *any* credit transaction—not just those involving financial statements or the like—because any such transaction can result in bankruptcy. In effect, the Eleventh Circuit superimposed a federal super-Statute of Frauds that renders much of the state doctrine obsolete.

But Congress doesn't lightly intrude on core state concerns like the rules of contract. And this Court has construed federal statutes narrowly to ensure that Congress doesn't accidentally trample "areas of traditional state responsibility." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); *see also Jones v. United States*, 529 U.S. 848, 858 (2000) (construing the federal arson statute strictly because "arson is a paradigmatic common-law state crime"). It would 'take a very clear provision to convince anyone of anything so odd" as a nationalized Statute of Frauds. *Field* at 516 U.S. 68. At the very least, a Congress that doesn't hide elephants in mouseholes wouldn't sneak a major intrusion on traditional state prerogatives into a subparagraph in the Bankruptcy Code by imposing a near-universal writing requirement. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

III. The Eleventh Circuit's misinterpretation would saddle small business with significant and unwarranted burdens that Congress never intended.

The Eleventh Circuit thought its nationalized writing requirement would be no big deal. *See* Pet. App. 13a ("[A] lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit."). It thought wrong. For the hundreds of thousands of small businesses that would be affected, it is a serious threat to the way business is done. As a practical matter, small businesses cannot remain actively "concerned about protecting [their] rights in bankruptcy" in every consumer contract. *Id.* Even if they could, it is not plausible to expect small businesses to demand or keep the sort of comprehensive written records about all customer statements that would become necessary under the Eleventh Circuit's expansion of § 523(a)(2)(A). But in the absence of such records, that expansion would create serious new credit risks for businesses. For those reasons, the Eleventh Circuit's rule would have drawn a strenuous objection from the small business community had it been proposed in Congress. But it was not, and this Court should not insert it here.

A. Demanding that small businesses create and keep comprehensive written records of all customer statements that induce credit is impractical.

Small businesses extend credit on a surprisingly vast scale. The Eleventh Circuit's rule would create a

correspondingly vast new paperwork mandate that small businesses could not hope to satisfy.

Roughly *half* of small businesses report extending some form of credit. *NFIB Nat'l Small Business Poll: Getting Paid* 3 (2001).[3] Some offer formal installment payment plans or layaway. *Id.* Others use informal arrangements, such as "half this month, half next." *Id.* And many use basic trade credit, more commonly known as "invoicing." *Id.* No matter what form of credit is used, they all entail exposure to bankruptcy risk. Because many small businesses cannot afford legal counsel in bankruptcy proceedings, they are unable to prevent that bankruptcy risk from becoming unrecoverable bankruptcy loss.

Under the Eleventh Circuit's rule, all of those credit arrangements would be subject to the new super-Statute of Frauds requiring "a written statement from the debtor before extending credit." Pet. App. 13a. Indeed, the lower court casually assumed that the lender could procure a written statement "easily." *Id.*

That assumption is far too rosy. First, most small businesses would be unlikely to learn about such a bankruptcy rule absent sophisticated counsel. Not knowing about the "incentive to create writings before the fact," those small business owners would suffer consequences that are "harsh after the fact." Pet. App. 13a.

Even for small businesses with savvy counsel, getting a written statement from a customer is often

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[3] http://www.411sbfacts.com/files/gettingpaid[1].pdf.

impractical, particularly for small companies that do business over the phone. At least in Main Street America, extracting such a statement can also be offensive to customers who understand—consistent with the general law of contracts—that their spoken word is their bond. And the Eleventh Circuit addressed none of the obvious practical problems with that "incentive," *id.*, such as where to store the resulting mountains of written statements, how to avoid turning each customer transaction into an administrative inquisition, or even how to pay for the additional employee time and storage space necessary to create and keep those statements.

In the real world, statements about financial circumstances are routinely made among businesses and their customers, especially when it comes to the extension of money or services. And while large banks and Fortune 500 corporations might typically demand financial statements in writing as part of a formal application process, many (if not most) small businesses are not set up that way. Often, such assurances are made on a more informal basis made possible by the relationships between small businesses and their customers. Indeed, the ability to act nimbly and without such red tape can be the key to a small business's success. The Eleventh Circuit's ruling is founded on a flawed assumption about how small businesses interact with their customers.

Small businesses can be particularly ill-equipped to handle a paperwork mandate for potentially sensitive customer information. "[L]ittle agitates small business owners more reflexively than the mention of paperwork." *NFIB Nat'l Small Business*

Poll: Paperwork and Record-Keeping 2 (2003).[4] That is because many small business owners must bear that burden personally—over half of small businesses report assigning primary responsibility for maintaining customer records to themselves or family members. *Id.* at 2-3. And that record-keeping doesn't come cheap. Owners estimate that their expenses for creating and maintaining customer records amount to nearly $43 per hour. *Id.* at 4.

The Eleventh Circuit also ignored the ominous privacy risks of storing so much customer data. *See* Identity Theft Resource Center, *2017 Annual Data Breach Year-End Review* ("The number of U.S. data breach incidents tracked in 2017 hit a new record high" with "55 percent of the overall total number of breaches" coming from the business sector).[5] In this very case, for example, the lower court would have had the petitioner store sensitive information about respondent's tax return. A rule requiring small businesses to collect reams of such data would paint a target on their backs for hackers. Already, the federal government and Fortune 500 companies have suffered numerous data breaches despite their sophisticated and expensive security measures. *See, e.g.*, Government Accountability Office, *Information Security: OPM Has Improved Controls, But Further Efforts Needed* 5 (GAO-17-614) ("In July 2015, OPM reported that a . . . cyber incident targeting its databases containing background investigation records was estimated to have compromised security

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[4] http://411sbfacts.com/files/paperwork.pdf.

[5] https://www.idtheftcenter.org/images/breach/2017Breaches/2017AnnualDataBreachYearEndReview.pdf.

clearance background information of about 21.5 million individuals.").[6]

The Eleventh Circuit's rule would make small businesses more attractive to hackers, but with only a fraction of the data security defenses. Small business owners would have to fear not only consumer lawsuits over data breaches, but costly enforcement actions by government agencies as well. *See, e.g.*, NFIB, *FTC's Evolving Data Security Rules: An Impossible Strict Liability Standard* (Jan. 9, 2017)[7]; *see also Paperwork and Record-Keeping* 7 (noting small business concerns over "the potential for suits and violation of laws" due to the "possibility of mishandling documents"). Even if small businesses could comply with what the Eleventh Circuit demanded, surely this is not what Congress had in mind for § 523(a)(2)(A).

B. The Eleventh Circuit's rule would exacerbate the already serious credit risks to small business.

Because small businesses are so often creditors in the ordinary course of business, a rule that would make debts procured by fraud generally *non*dischargeable would be a real problem. Unsurprisingly, small businesses suffer nonpayment due to bankruptcy at high rates. Thirty-six percent of small businesses reported lost revenue due to customer bankruptcy over a five-year period. *Getting Paid* 6. Of those, three out of five "lost money to a personal bankruptcy," *id.*, which is the sort affected by

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[6] https://www.gao.gov/assets/690/686400.pdf.

[7] https://www.nfib.com/content/legal-blog/marketing/ftcs-evolving-data-security-rules-an-impossible-strict-liability-standard/.

the Eleventh Circuit's fraudster-friendly interpretation of § 523(a)(2)(A). NFIB has about 300,000 members, with billions of dollars of total revenue. *See* U.S. Small Business Administration, *Small Business GDP: Update 2002-2010*, at 1 (2012)[8] (estimating that "[s]mall businesses produced 46 percent of the private nonfarm gross domestic product"). With odds of bankruptcy nonpayment that high, the total losses are staggering.

Even when bankruptcy losses strike a single small business, the effects can be severe. This case provides a perfect illustration. The petitioner is a law firm with only four attorneys.[9] It continued to perform extensive legal work based on respondent's promise that the overdue fees would be paid out of his imminent tax refund. The bankruptcy court and district court found that petitioner reasonably relied on respondent's assurances. Yet the Eleventh Circuit held that those assurances were meaningless, and let respondent walk away from his fraudulently induced debt, scot-free, inflicting a serious harm on an innocent creditor. The loss amount here—more than $100,000—would be a material hit for just about *any* company. But for small businesses, in particular, a $100,000 or even smaller loss can be debilitating if not devastating. *See* Pet. Br. 14.

This does not just concern law firms. Any small business could find itself in similar straits. For example, suppose a contractor agrees to perform renovations for a homeowner based on the

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[8] https://www.sba.gov/sites/default/files/rs390tot_1.pdf.

[9] *See* Lamar, Archer, & Cofrin, LLP, http://www.laclaw.net/attorneys.html.

homeowner's false representations that he will pay for the work with the proceeds from the imminent sale of non-existent stock. After the contractor sinks hundreds or thousands of dollars' worth of materials in the project—and as much or more in hourly wages—the Eleventh Circuit would allow the homeowner to discharge any claim the contractor may have against the homeowner simply because the homeowner's false representation about a specific asset related in some sense to his financial condition.

So too the owner of a valuable antique clock who convinces a skilled horologist to perform painstaking restoration on the false promise that the horologist would be compensated from the sale of an antique watch the owner has no right to sell. Or a body shop proprietor who spends thousands of dollars restoring vintage cars, expecting to be repaid with the proceeds of the customer's falsified overtime pay. The possibilities are endless for small businesses to fall victim to these classic common-law fraud scenarios "lying at the heart of" the nondischarge provisions. *Joelson*, 427 F.3d at 710. Yet the Eleventh Circuit's construction of § 523(a)(2)(A) block them all from the protection of the Code's anti-discharge rule.

In short, Congress probably would not choose to penalize innocent small-business owners to protect dishonest debtors, and it should "take a very clear provision to convince anyone of anything so odd." *Field*, 516 U.S. at 68. Section 523(a)(2)(A) doesn't come close. The Eleventh Circuit improperly substituted its own view of what makes sense for the Bankruptcy Code and, worse, it did so based on fundamentally flawed assumptions about how business works on Main Street.

CONCLUSION

For these reasons, the judgment of the Eleventh Circuit should be reversed.

March 5, 2018

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No. 16-1215

IN THE

Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE EUGENE WEDOFF (RET.) AND A GROUP OF LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae,* whose names are set forth below, include a former bankruptcy judge and law professors at various universities where they teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law.

The Honorable Eugene Wedoff (ret.) served as a U.S. Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987-2015 and as Chief Judge from 2002-07. Before his judicial service, Judge Wedoff was a partner and member of the executive committee of the Chicago law firm of Jenner & Block. He served as a member and as the chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014, and as a governor, secretary, and president of the National Conference of Bankruptcy Judges through 2015. He is currently president of the American Bankruptcy Institute. He is a Fellow of the American College of Bankruptcy and a member of the National Bankruptcy Conference.[2]

Margaret Howard is the Law Alumni Association Professor of Law, Emerita, at Washington and Lee University School of Law, Lexington, Virginia. She

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[1] Pursuant to this Court's Rule 37.3(a), both parties sent a letter or email granting consent to this *amici curiae* brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

[2] The views set forth herein are the personal views of Judge Wedoff and the named *amici* and are not necessarily the views of the American Bankruptcy Institute, which has not participated in any way in this appeal.

has taught and conducted research on topics in bankruptcy law for more than three decades, with an emphasis on discharge issues in consumer bankruptcy. She holds a B.A. from Duke University, a J.D. and M.S.W. from Washington University in St. Louis, and an LL.M from Yale University. She has served as the Scholar in Residence at the American Bankruptcy Institute, and as the ABI's Vice President in charge of the Research Grants Committee. Professor Howard is a fellow of the American College of Bankruptcy and the American Law Institute.

Professor Jack F. Williams is a professor of law at Georgia State University and the Center for Middle East Studies, where he teaches and/or conducts research on bankruptcy and business organizations; mergers and acquisitions; and taxation and statistics. He is the Association of Insolvency and Restructuring Scholar in Residence. He is a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D in archaeology from the University of Leicester in Leicester, United Kingdom.

David R. Kuney is an Adjunct Professor at the Georgetown University Law Center where he teaches bankruptcy law. He has taught at American University's Washington College of Law and at New York Law School. He was formerly a partner at the law firm of Sidley & Austin. He currently serves on the Board of Directors of the American Bankruptcy Institute. He is a fellow in the American College of Bankruptcy.

Your *amici* are submitting this brief out of a concern that the discharge provisions of the Bankruptcy Code not be interpreted in such a fashion as to cause unwarranted economic injury to individual debtors

nor to the larger economy. We write because Petitioner has offered an interpretation of the Code and a view of debtors that we believe is decidedly incorrect and will cause economic harm to many.

The central issue in this case concerns the correct interpretation and application of one of the key discharge provisions in the U.S. Bankruptcy Code,[3] namely, 11 U.S.C. § 523(a)(2)(A). This provision states that the Code prohibits the discharge of "any debt . . . for money, property, [or] services . . . to the extent obtained by . . . false pretenses [or] false representation . . . *other than* a statement respecting the debtor's . . . financial condition" (emphasis added).

Petitioner argues that the phrase "other than" only excludes from the rule of non-dischargeability a debt obtained by an oral misrepresentation that is tantamount to a "standard" financial statement, e.g., statements that reflect a debtor's overall assets and liabilities.[4] Oral statements about a debtor's individual assets or debts, large or small, material or not, would potentially bar a discharge, in Petitioner's view. Debtors would be subject to a discharge challenge based on oral statements, often made many years earlier, for which there is no written evidence and without any showing of reasonable reliance.[5]

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[3] 11 U.S.C. § 101 *et. seq.* (the "Code").

[4] *See, e.g., In re Joelson*, 427 F.3d 700, 707 (10th Cir. 2005) (describing the limited view that the phrase "statement respecting the debtor's . . . financial condition" as used in § 523(a)(2)(A) means "a debtor's net worth or overall financial condition.").

[5] *See Field v. Mans*, 516 U.S. 59 (1995) (requiring the lesser showing of "justifiable reliance").

The Eleventh Circuit held the opposite, finding that an alleged oral misrepresentation concerning even a single asset may still be a statement "respecting" or "related to" one's financial condition, and hence may not serve as the basis to bar a debtor's discharge. This view was, until recently, the majority view.[6] The Solicitor General, representing the United States as the largest creditor in bankruptcy matters, agrees. S.G. Opp. Br. 21. So do we.

Petitioner's opening sentence describes Mr. Appling as one who lied to his attorneys and references to lying appear four times in the first paragraph. Pet. Br. 2. Petitioner also argues that the Eleventh Circuit's ruling would permit a "truck" to be driven through the Code's discharge provisions. Cert. Pet. 2. Implicit in this opening argument is a view of debtors, collectively, as "can-pay" individuals who will opportunistically seek to game the system when given the chance. Petitioner's brief is premised on this unflattering view of the population of individual debtors and a notion that Congress has sought to rein in misconduct by ever stricter views of who deserves a discharge.

Petitioner's view of both debtors collectively and of Congressional response to the discharge issue are decidedly inaccurate. We urge a different view and one widely supported by the existing empirical data, which is missing from Petitioner's brief. The large body of economic data on the true nature and purpose of the discharge for individual debtors in the bankruptcy system discloses not only a bona fide need

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[6] See *In re Powell*, 423 B.R. 201, 210 (Bankr. N.D. Tex 2010) ("Other courts (and the emerging majority of cases) adopt a more liberal view. Those courts have defined the phrase to encompass a much broader class of statements, even those which relate to a single asset or liability.").

for discharge protection, but the macroeconomic value that relieving debt has on the general economy. Congress is aware of this plight and Congressional statements, as well as the legislative movement, over the past 60 years, have sought to broaden protection of the discharge. The Eleventh Circuit correctly perceived this.

The bankruptcy discharge goes to the very heart of bankruptcy law and deeply affects its administration, outcome, and social value. "[T]he introduction of the discharge [into modern bankruptcy law] could well be considered the single most important event in bankruptcy history." Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 20 (1989). Indeed, commentators have observed that the bankruptcy discharge "ranks ahead in importance of all others in Anglo-American bankruptcy history." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 164 (1996).

This case has widespread importance to potentially millions of individual Chapter 7 debtors because of its potential to deny a discharge for debtors and to change the law in many jurisdictions.[7] Individual debtors who seek bankruptcy relief have been well-studied and their economic plight analyzed with statistical care: "when bankrupt debtors as a group are compared to the general population, their situations are grim."

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[7] The number of non-business bankruptcy filings in 2017, 2016, and 2015 was as follows: 770,901, 808,781, and 911,086, respectively. *March 2017 Bankruptcy Filings Down 4.7 Percent*, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent [https://perma.cc/LB7B-CAEA].

Sullivan et al., *As We Forgive Our Debtors*, *supra* at 77. The data shows "a segment of America in financial collapse." *Id.*

Petitioner's harsh rule strays far from the underlying principles expressed by this Court over eighty years ago, in which this Court held that bankruptcy discharge is an essential aspect of one's financial and personal "liberty." *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

> The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve the free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern . . . . The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite period of time in the future to the payment of indebtedness incurred prior to his bankruptcy.

The underlying principles of *Local Loan* pertain here, as does long-standing practice and the words of the Code. For these reasons set forth below, the Eleventh Circuit's decision should be affirmed.

SUMMARY OF THE ARGUMENT

The Bankruptcy Code, at 11 U.S.C. § 523(a)(2)(A), prohibits a discharge of "any debt . . . for money, property, [or] services . . . to the extent obtained by . . . a false representation . . . other than a statement respecting the debtor's . . . financial condition." The question presented in this case is whether the phrase beginning with "other than" should be broadly interpreted to mean a statement concerning even a single asset or whether it should be narrowly construed to mean only a statement regarding the debtor's overall financial condition. The better-reasoned rule, and the rule consistent with congressional intent and sound bankruptcy policy, is that § 523(a)(2)(A) *may* include a statement concerning even one asset where that statement bears on the debtor's ability to perform or pay the relevant transaction. Accordingly, the decision of the Eleventh Circuit should be affirmed for the following reasons:

First, the proper judicial interpretation of § 523(a)(2)(A) requires consideration of the underlying economic rationale of the bankruptcy discharge, as well as the statutory language used by Congress. One informs the other. The ability of an individual consumer debtor to obtain a discharge in bankruptcy has been said to be a matter of economic life and death. "The consequences to a debtor whose obligations are not discharged are considerable; in many instances, failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007). Petitioner's overly narrow view of § 523(a)(2)(A) injures not only individual debtors, but also has a demonstrated harm to the macro economy by discouraging family formation, educational expenditures, and overall participation in the economy.

Second, the statutory language of § 523(a)(2)(A) fully demonstrates a broader reading of the protection for the discharge. The phrase "respecting financial condition" was first introduced into American bankruptcy law in 1926. Virtually every circuit court that interpreted this section prior to adoption of the Code in 1978 held that the phrase was *not limited* to only a formal financial statement. Petitioner's reliance on the Code definition of "insolvency" as somehow supplying the definition of "financial condition" is unsound and contradicted by other Code-based definitions of insolvency that suggest a different outcome.

Third, the legislative history likewise shows that Congress has been moving steadily toward broader protection of the discharge for individual debtors. The key terminology, such as "financial condition" and "false statement" were untethered to any notion of a formal financial statement. Indeed, when Congress enacted the 1978 Code, the Bankruptcy Commission created to recommend changes to the bankruptcy law was so concerned over creditor abuse of the "financial condition" provision that it "recommended that this exception to discharge be eliminated for consumer debts." H. Rep. No. 95-595 (1977). App. 47a. While Congress did not eliminate it, Congress did strictly limit the ability to challenge the discharge in new § 523(a)(2)(A). It is inconceivable that the Code should now be read as making the discharge *less available* when Congress was seeking exactly the opposite outcome.

Accordingly, we urge this Court to affirm the decision of the Eleventh Circuit.

ARGUMENT

I. The availability of a discharge is of critical importance to individual debtors, to the larger economy, and to the proper functioning of the bankruptcy system.

A. The correct interpretation of 11 U.S.C. § 523(a)(2)(A) should begin with the economic and contextual importance of the bankruptcy discharge for the individual debtor.

The discharge provisions of the Code were not drafted in a vacuum; they were instead manifestly responsive to perceived economic distress. Thus, a proper interpretation of § 523(a)(2)(A) must reflect the bankruptcy discharge's impact on the individual debtor, the larger social and economic benefits of the discharge, and Congressional recognition of these values. "[T]he [Bankruptcy] Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 279 (1940) (internal citations omitted).

Petitioner argues that the rule announced by the Eleventh Circuit undermines the primary operation of § 523(a)(2)(A) "by creating a loophole through which dishonest debtors might relieve themselves, at honest creditors' expense, of liabilities incurred through fraud." Cert. Pet. 21. Petitioner argues that the broad rule would permit debtors to "drive a truck" through the intended policy of Congress. *Id.*

All of these contentions are lacking in any empirical data to support the notion of meaningful debtor abuse.

Indeed, Petitioner offers no support for the view that Chapter 7 debtors are in any position to "drive a truck" through Code-based policies nor that such debtors even exist.

Instead, empirical data demonstrates that the typical Chapter 7 debtor seeks bankruptcy protection due to a grim and serious economic plight, rather than misconduct, over-spending, or other non-productive economic conduct. Economic relief in the form of a discharge is of critical importance, and often protects the debtor from health and life-risking choices, such as between medical treatment and food.[8] This is important because one in ten Americans has filed for either a Chapter 7 or a Chapter 13 bankruptcy. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* 22 (2000).

When asked why they filed for bankruptcy 67.5 percent of debtors reported job loss, 19.3 percent cited a medical event, and 22.1 percent listed family concerns (i.e. divorce) as contributing factors that led to their bankruptcy. *Id.* at 16 fig. 1.2. These Americans file for bankruptcy not because it is "an easy way out," but because they have run out of options. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091, 1138 (1983).

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[8] One of the largest single causes for the filing of Chapter 7 bankruptcy by individuals is catastrophic medical issues, such as cancer, automobile and industrial accidents, and age-related issues. Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017), https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx [https://perma.cc/M8WA-2WQ8].

Debtors who seek bankruptcy protection earn much less money and owe much more than the average American. Robert M. Lawless, et. al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 Am. Bankr. L. J. 349, 371–72 (2008).

> [The] median household income for bankrupt debtors in 2007 was about $27,100—statistically indistinguishable from the $27,800 in 2001 and $27,100 back in 1991. Median household income across the United States in 2006 was $48,200. These figures put the income of the median bankrupt household in 2007 a full 45% below the income of the median household in the general U.S. population.

Id. at 363.

Only a small fraction of debtors had any hope of repaying their debt outside of bankruptcy. Even those debtors who voluntarily attempted repayment in Chapter 13 were in terrible shape: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. *See* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 123 (1994).

The discharge provisions have proven to be effective. Debtors who obtain a discharge are generally restored to a productive role in the larger economy. Empirical studies support the concept of fresh start. Indeed, "the average person who files for bankruptcy to relieve financial stress catches up with their peers." Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers'*

Post-Discharge Finances: Struggle, Stasis, or Fresh-Start? 16 Am. Bankr. Inst. L. Rev. 283, 289 (2008).[9] "One study compared bankruptcy filers with non-filers regarding key economic factors such as car ownership and debt, home ownership and debt, savings, credit card ownership, income, and work." *See id.* at 296. "None of the data indicate that over time the size of the financial gap between bankruptcy filers and non-filers either gets wider or stays the same; for the most part, the size of the financial gap between these two groups narrows over time." *Id.* at 307. Thus, empirical research establishes that the discharge provisions achieve the key goal of restoring individuals to economic capacity.

B. The correct interpretation of 11 U.S.C. § 523(a)(2)(A) should reflect the fiscal and contextual importance of the bankruptcy discharge on the larger economy.

The bankruptcy discharge benefits the larger economy while aiding the individual. Petitioner incorrectly posits the bankruptcy discharge as a benefit only to the individual debtor, and then, only on a strict condition of "honesty." This misses much of the point about the importance of the discharge. The discharge also has macro consequences which benefit the larger economy. "The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. The debtor then is able to resume his or her place as a productive

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[9] *See also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67, 87 (2006) ("The majority, 65% of families, reported that their financial situations had improved since they filed bankruptcy.").

member of society." Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364–65 (1991). Essentially, "the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth." 2 *William Blackstone, Commentaries* *484.

Additionally, "it has been noted that the Chapter 7 debt discharge prevents the development of an insolvent underclass and incentivizes entrepreneurship by offering a mandatory insurance policy for failed business endeavors." Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1618 (2013). This in turn encourages investment and economic stability.

While the discharge has a beneficial effect on the macro economy, the availability of a discharge for individual debtors has no significant impact on small business owners. The notion that the bankruptcy discharge has a significant adverse effect on small businesses is untrue, despite assertions of one *amici* in this case suggesting that the Eleventh Circuit rule is "fraudster friendly" and will injure small business. *See* NFIB Br. 17. The lack of bankruptcy harm to small business can be seen in the very polling data that the NFIB cites in its amicus brief, showing that only four percent of small businesses consider bankruptcy a cause of customer non-payment. *NFIB National Small Business Poll Getting Paid* 3 (William J. Dennis, Jr. eds., 2001), http://www.411sbfacts.com/files/gettingpaid[1].pdf [https://perma.cc/CDZ7-PX6T]. This was only slightly greater than the "cost of using credit cards" at 2.9%. *Id.* Ninety-seven percent of all small business owners do not expect to encounter more

than one bankruptcy case per year. *Id.* at 6 ("That means about three percent of the entire small-business population failed to receive payment in five or more bankruptcy cases over the last five years, or one or less [sic] than case per year."). Indeed, small business owners "benefit more from liberal bankruptcy laws than perhaps any other group." *Id.*

It is also untrue that the rule in the Eleventh Circuit would create for the first time a rule requiring "mountains of paperwork" or a novel federal statute of frauds. NFIB Br. 3. Until 2010, the majority of courts did in fact follow the very rule urged by the Eleventh Circuit. *See In re Powell*, 423 B.R. at 210–11. Reversal of the Eleventh Circuit is far more likely to cause disruption in the operation of the bankruptcy system.

C. Chapter 7 debtors frequently lack legal counsel for discharge litigation, which leaves them vulnerable to unwarranted settlement pressure.

The economic distress of the individual debtor, as mentioned above, also means that Chapter 7 debtors frequently lack financial resources to retain legal counsel to defend themselves from discharge challenges, whether well-grounded or not. Beginning in at least 1960, Congress became aware that the discharge provisions were being manipulated by institutional creditors who were able to intimidate honest debtors into surrendering their discharge in order to avoid litigation. It was precisely this threat of intimidation, noted by Congress in 1960 that led to one of the major reforms in discharge legislation. S. Rep. No. 86-1688 (1960). See App. 23a-24a. There is a well-documented history showing that the mere threat of a discharge challenge is often sufficient to provoke an unwarranted settlement in which the debtor surrenders his

or her discharge. Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111, 118–23 (2018).

This intimidation factor is exacerbated by the equally well-documented difficulty in providing legal representation to Chapter 7 debtors who confront discharge litigation. Legal counsel for Chapter 7 debtors frequently "unbundle" their legal services and decline to undertake representation of the debtor in an adversary proceeding challenging the discharge. "Unbundling" allows attorneys to limit the scope of their representation by excluding expensive tasks like adversary proceedings from their general services.

If a creditor challenges the discharge, an adversary proceeding may result. With these services "unbundled," a Chapter 7 debtor may have to decide whether to pay additional and indeterminate legal fees or simply allow the creditor to collect its known debt in full, thus by-passing the collective process of bankruptcy. Debtors who appear *pro se* have less favorable outcomes in judicial proceedings.[10]

The frequent inability to retain legal counsel for discharge litigation makes Petitioner's view of § 523(a)(2)(A) even more abusive. *See* William F. Stone, Jr. & Bryan A. Stark, *The Treatment of*

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[10] *See, e.g.*, Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1957 (2011) ("The percentage of pro se cases rose statistically significantly, especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined.").

Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render, 82 Am. Bankr. L.J. 551, 555 n.25 (2008).

The mere threat of discharge litigation is likely to provoke a settlement and waiver of the discharge, regardless of the merits of the discharge objection. Prior to enacting the 1978 Code, the House Judiciary Committee noted that, "[t]he threat of litigation over this [discharge] exception and its attendant costs are often enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation" even with respect to "marginal cases." H. Rep. No. 95-595 (1977). App. 47a-48a.

The foundation of Petitioner's argument is essentially empirical. Yet, Petitioner has not remotely shown that there is statistically significant fraud in the discharge area that justifies a narrower view of what is dischargeable. Nothing in the record before this Court, reported case law, or in Petitioner's brief justifies a harsher interpretation of § 523(a)(2)(A) based on a uniform notion of debtor misconduct and risk of fraud. Mr. Appling is an isolated case.[11] His conduct is hardly the occasion to interpret § 523(a)(2)(A) in a way that produces negative macroeconomic effects by potentially injuring the nearly one million individuals who seek bankruptcy relief each year.

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[11] "[T]he consumer bankruptcy system is generally utilized by American families in grave financial circumstances." Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of Bankruptcy Discharge*, 58 U. Kan. L. Rev. 553, 614 (2010).

II. Section 523(a)(2)(A) should be interpreted broadly to mean that the exception to nondischargeability may include an oral statement about a single asset.

A. Section 523(a)(2)(A) expressly adopts a broad notion of what is dischargeable by use of the word "respecting" to modify financial condition.

The phrase "financial condition" is not defined in the Code. Instead, the Code includes a key modifier, namely, the word "respecting," which plainly connotes a broad and non-exclusive meaning. Petitioner, however, urges a "narrow" definition which essentially disregards the full import of "respecting." Pet. Br. 20–21.

Petitioner's argument that this Court disregard the term "respecting" violates a core rule of statutory construction that requires that each word be given its full meaning.[12] The term "respecting" is pivotal. "Respecting" is defined as "with respect to; with reference to; as regards." *Respecting*, *Oxford English Dictionary* (3d ed. 2010). "Respecting" is also defined to mean "[i]n relation to; regarding." Funk & Wagnalls, *Standard Encyclopedic Dictionary*, 567 (1968).[13] This means that the term "respecting" *expands* upon subsequent terms in the phrase or sentence.

"Respecting" embraces notions of being "related to." This Court has interpreted the phrase "relate[d] to"

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[12] *See, e.g.*, *Rake v. Wade*, 508 U.S. 471 (1993) ("To avoid deny[ing] effect to a part of a statute we accord significance and effect to every word.") (citations omitted).

[13] *See also*, FunkandWagnalls.com (same).

as being "deliberately expansive." *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992) ("We have repeatedly stated that a law 'relate[s] to' a covered employee benefit plan for purposes of [ERISA] 'if it has a connection with or reference to such a plan' . . . and thus gives effect to the 'deliberately expansive' language chosen by Congress."); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96–97 (1983) (same).[14] The same is true within this Court's constitutional jurisprudence. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Significantly, in 1987, a House Report described the discharge provision as dealing with a "false statement in writing *concerning* the debtor's financial condition . . . " H. Rep. No. 95-595 (1977). App. 44a (emphasis added). This use of "concerning," much like "respecting," shows that Congress was looking broadly and well beyond merely formal financial statements.

Petitioner argues that "respecting" is too broad when read to mean "related to," complaining that "everything is related to everything else." Pet. Br. 31. But the statute is intended to be broad. The language in § 523(a)(2) was originally an exception to the discharge and *was* broad; this key point is expressly conceded by Petitioner who notes that the precursor to this section was intended to be "as broad as its authors could do it . . . " Pet. Br. 9. Further, Petitioner's argument overlooks the important judicial ability to draw sensible lines within broad language that conform to congressional purpose. *See Lemon*, 403 U.S. at 612.

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[14] This Court also found that the phrase "in relation to" in a criminal statute clarified that a firearm "must have some purpose or effect" with respect to a drug trafficking crime. *See Smith v. United States*, 508 U.S. 223, 237 (1993) (citation omitted).

B. Prior to the adoption of the Code in 1978, most circuit courts generally interpreted "respecting financial condition" as applying to more than a formal financial statement.

The "broad" meaning of the phrase "respecting financial condition" has longstanding roots in settled case law that dates back to 1928. The phrase "respecting financial condition" first appears in H. Rep. No. 69-1257 (1926) (App. 8a) when Congress was in the process of amending what was then § 14b of the Act, which precluded a discharge of all debts for a false statement. See Act of May 27, 1926, § 6, 44 Stat. 663. App. 10a. S.G. Opp. Br. 16. (See Section III below).[15]

Following the introduction of the phrase "respecting financial condition" in 1926, the circuit courts generally interpreted this phrase broadly as meaning more than a formal financial statement. The Fourth Circuit appears to be the first circuit court to apply it. In *Lockhart v. Edel,* the Fourth Circuit held that statements made by a brokerage firm that it would purchase stock for the account of its customers upon receipt of a partial payment was false because the brokerage company was insolvent and unable to perform. *Lockhart v. Edel,* 23 F.2d 912 (4th Cir. 1928). "The representation was that the firm was in a position financially to fulfill the promise held out to its customers . . . when in fact they could not have possibly done so . . ." and hence was a statement with respect to financial condition. *Id.* at 913.

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[15] The Act was amended in 1960 so that a false statement respecting financial condition would only bar a discharge of a nonbusiness debtor of the particular debt in question. Act of July 12, 1960, Pub. L. No. 86-621, § 2(a), 74 Stat. 409. App. 33a-34a.

In 1945, the issue was given more extensive discussion by the Sixth Circuit. *See Albinak v. Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945). In *Albinak*, the argument was first made that the term "financial statement" was a "term of art" that only applied to a "complete statement of assets and liabilities by which the precise financial worth of the person making the statement can be determined." *Id.* at 110.[16] The Sixth Circuit rejected this narrow view, stating, "No [case] has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities." *Id.*

In 1950, the Ninth Circuit agreed. *Mau v. Sampsell*, 185 F.2d 400, 400 (9th Cir. 1950) (finding that debtor's letter "stating that an existing escrow would soon net him cash in excess of the debt" constituted a report of financial status under 11 U.S.C. § 32(c)). In 1967, the Eighth Circuit joined with the Fourth, Sixth, and Ninth Circuits on the meaning of the phrase "respecting financial condition." *See Shainman v. Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967), stating, "A written statement purporting to set forth the true value of a major asset, its inventory, is a statement respecting the financial condition of that corporation." The court rejected the very argument made in this case by Petitioner: "There is nothing in the language or legislative history of this section of the Act to indicate that it was intended to apply only to complete financial statements in the accounting sense." *Id.*

Finally, shortly before the adoption of the Code in 1978, the Ninth Circuit again addressed the issue.

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[16] The court was then construing Section 14 of Chapter 3 of the Bankruptcy Act, 11 U.S.C.A § 32.

Tenn v. First Hawaiian Bank, 549 F.2d 1356, 1357–58 (9th Cir. 1977) (*per curiam*). Here, the debtors informed the bank they owned certain real property based on a deed in their favor from their mother. Shortly after the loan was made, they reconveyed the property back to their mother. The Ninth Circuit affirmed the denial of a discharge, finding that "appellants' recordation of deed . . . for the purpose of obtaining an extension of credit on the basis of [that] asset . . . was a false statement of financial condition." *Id.* at 1358.

Petitioner tries to swat away *Albinak* and *First Hawaiian Bank* but offers no analysis. Pet. Br. 44. It points to a "mine" of cases contained in a footnote which "involved" a false financial statement. That "involvement" however was not the same as a doctrinal statement within these cases that only a formal financial statement constituted a "statement respecting financial condition" under § 14 of the Act. Pet. Br. 43, n.5. Indeed, none of the cases cited in this "mine" stands for the view that the phrase "respecting financial condition" is to be narrowly interpreted as only a formal financial statement as a matter of law.

Petitioner next argues that because the purpose of the pre-1978 parallel language was to *deny* discharge, the 1978 reversal to making "statements respecting . . . financial condition" an exception to denying discharge should change the meaning of the phrase. Pet. Br. 45. However, when the 1978 Code was adopted, the view of the circuit courts was that "statements respecting . . . financial condition" did not mean merely a formal financial statement. Congress expressly stated that it did not intend to change the law in this provision. H. Rep. No. 95-595 (1977) App. 50a-51a. Thus, "there is no reason to suppose that Congress

disagreed with [pre-1978] interpretation[] when it enacted [the 1978 Code]". *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010). Prior construction of identical language should continue "in the absence of plain implication to the contrary." *Key v. Doyle*, 434 U.S. 59, 76 n.5 (1977) (quoting *Heald v. District of Columbia*, 254 U.S. 20 (1920)).

Following the adoption of the 1978 Code, courts continued to construe similar language in new § 523(a)(2)(B) to include written statements regarding even a single asset.[17] Until recently, the majority rule was consistent with the result reached below by the Eleventh Circuit. *See, e.g., In re Powell*, 423 B.R. at 210 (construing § 523(a)(2)(B) and holding that the majority view is the broad view).[18] Others cases were in accord. *See, e.g., In re Cook*, 46 B.R. 545, 548–49 (Bankr. E.D. Va. 1985) (list of property owned by debtor to secure a loan is a statement of a debtor's financial condition); *In re Prestridge*, 45 B.R. 681, 682 (Bankr. W.D. Tenn. 1985) (in construing § 523(a)(2)(B), the bankruptcy court acknowledged that a statement that one's assets were not encumbered qualifies as a statement respecting financial condition; "Congress did not speak in terms of financial statements. Instead it referred to a much broader class of statements.") (citations omitted); *In re Roberts*, 54 B.R.

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[17] Cases did not always distinguish between § 523(a)(2)(A) and § 523(a)(2)(B).

[18] "[T]he emerging majority of cases[ ] adopt a more liberal view. Those courts have defined the phrase to encompass a much broader class of statements, even those which relate to a single asset or liability." *In re Powell*, 423 B.R. 201, 210–11 (Bankr. N.D. Tex. 2010).

765, 769–71 (Bankr. D.N.D. 1985) (statement describing collateral pledged to bank is one concerning the debtor's financial condition).

Thus, while some more recent decisions have disagreed with the result reached by the Eleventh Circuit, the meaning of the phrase "respecting financial condition" was well settled by the circuit courts at the time of the adoption of the 1978 Code. Congress has given no indication that it intended to vary from this large body of case law.

C. The meaning of "financial condition" cannot be determined by reliance on the definition of "insolvency" in Code § 101. The definition of equitable insolvency provides a better tool for interpreting "financial condition."

Petitioner contends that the meaning of "financial condition" can be found by looking to the Code's definition of "insolvent," found in § 101(32). Cert. Pet. 19. Pet. Br. 23. Pet. Add. 12. Section 101(32) defines insolvency as a "financial condition such that" one's debts are greater than one's assets. From this they draw the untenable conclusion that since insolvency is one aspect of one's financial condition, Congress somehow meant to define "financial condition" exclusively as a statement containing all assets and liabilities.

The phrase "such that" by itself indicates that having liabilities greater than assets is but one example of a financial condition. *See Taltech Ltd. v. Esquel Enterprises Ltd.*, 410 F. Supp. 2d 977, 1003 (W.D. Wash. 2006) (defining "such that" as inclusive, not restrictive; the prior term "*creates or results in*" the subsequent term). There is nothing to suggest balance sheet insolvency is the Code's exclusive notion of a

"financial condition." Indeed, not until 2005 did any court ever suggest such an odd linkage, despite the phrase having been part of bankruptcy law since at least 1898; even then the Tenth Circuit said the relationship between the two Code sections was only "tangential." *In re Joelson*, 427 F.3d at 705.

However, if this Court determines that the definition of "insolvency" bears on this issue at all, then a far better tool is to employ the other widely-used definition in the Code, namely, equitable insolvency. Equitable insolvency has a long settled meaning of referring to a debtor's inability to pay debts as they mature. *See Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1064 (3d Cir. 1992). This concept is incorporated into Code § 548(a)(1)(B)(ii)(III) as part of the trustee's avoidance powers. For example, a trustee may "avoid" a transfer under Chapter 5 of the Code (e.g., for a fraudulent conveyance) if at the time of the transfer the debtor intended to incur debts that were beyond its ability to pay. This has traditionally been labelled as "equitable insolvency."

"Insolvency" is a multivalent term as used in bankruptcy court. *See In re Dolata*, 306 B.R. 97, 133 (Bankr. W.D. Pa. 2004) (finding that § 548(a)(1)(B)(ii)(III) was satisfied because "the debtors either intended to incur or believed that they would incur debts that . . . would be beyond their ability to satisfy as such debts matured"); *In re Kanour*, No. 09–07030JAD, 2010 WL 8354696, at *4 n.6 (Bankr. W.D. Pa. July 1, 2010) ("Section 548(a)(1)(B)(ii) also includes relief . . . if the debtor was rendered "insolvent" in an "equitable" sense. Section 548(a)(1)(B)(ii)(III) states that a debtor may be insolvent . . . if a debtor 'intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts

matured' . . ."). *Cf. In re C.F. Foods, L.P.*, 280 B.R. 103, 117 n.30 (Bankr. E.D. Penn. 2002) (showing how the Bankruptcy Code provides "independent bases for avoiding constructively fraudulent transfers without proving balance sheet insolvency").

The notion of "insolvency" is not limited to a balance sheet test but may reflect *any aspect* of financial condition that would give rise to an inability to pay one's debts. If "insolvency" is to be used as a guide for understanding the phrase "financial condition," then it is better understood to include any statement that bears on the debtor's ability to pay or perform the underlying obligation. This could include a statement about a single asset or a combination of assets. This is precisely the argument offered by the Solicitor General, stating that an affirmative representation by a debtor qualifies as a "statement respecting the debtor's . . . financial condition" where it "relates to a debtor's financial circumstances and is offered by the debtor as evidence of his ability to pay." S.G. Opp. Br. 14. We agree.

III. The legislative history demonstrates that Congress has been expanding protection against loss of the discharge and that § 523(a)(2)(A) was intended to have a broad meaning.

The plain meaning of "respecting" and the settled case law that preceded the enactment of the 1978 Code provide this Court with a sufficient basis to affirm the Eleventh Circuit's ruling. Petitioner, however, urges a different result based on its reading of the legislative history. Pet. Br. 36 *et seq.* Petitioner focuses on the 1960 amendments to the Bankruptcy Act. It argues that Congress added the "financial condition" exception in 1960, and that it did so *only* in response to the

problem of consumer credit companies attempting to shield their claims from discharge by encouraging debtors to make false financial statements. Cert. Pet. 2. From this, it argues that Congress intended to "tweak" the "general policy" by excepting from non-discharge only a misrepresentation made in a formal financial statement. *Id.* Hence, the "narrow" rule Petitioner urges here.

Neither argument is correct. The key language that matters in this case ("respecting" and "financial condition") emerged well *before* 1960 and was *not* limited to financial statements that listed all assets and liabilities. The introduction of the phrase "financial condition" in 1898 was, from the outset, given a broad meaning, and not tethered only to formal financial statements. *See also*, Section II, above.

Nor was Congress merely "tweaking" the Act or the Code when it adopted the various amendments. Congress was responding to specific findings of creditor abuse in attempting to block discharges, as well as overly harsh interpretations of the discharge provision. Statements in the legislative history spanning from 1910 to 1978 reflect specific Congressional concern that the discharge provisions not be too "harsh," that they not make "careless" and "general statements" the basis for blocking a discharge. Congress saw the need to protect debtors from documented creditor abuse of the discharge provisions by intimidating debtors into unwarranted settlements. By 1977 the Bankruptcy Commission would recommend that Congress delete the provision *entirely*. *See* App. 47a.

A. "Financial condition" has been broadly defined since the passage of the Bankruptcy Act in 1898.

The Bankruptcy Act of 1898[19] barred a discharge completely when the debtor acted with fraudulent intent to conceal his or her "true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained." Act of 1898, § 14b(2), 30 Stat. 544, 550. App. 1a. This appears to be the first use of the phrase "financial condition" in American bankruptcy law.

The reference to "true financial condition" and then to "true condition" suggests here, as elsewhere, that the real concern was with the substance of the non-disclosure, and not whether it was embodied in any particular kind of document or whether it pertained to all assets and liabilities. The term "condition" is broadly generic. Non-disclosure of a single asset could well obscure a debtor's "condition." The phrase was *not* limited to a formal financial statement when first used, let alone later. Nor was the phrase tied to "so!vency" as Petitioner later argues. Solvency may be a component, or aspect, of a "condition," but it is hardly the only such component.

The Act was amended in 1903 when Congress added language to § 14b that barred a discharge when the debtor "obtained property on credit . . . upon a materially false statement in writing made . . . for the purpose of obtaining such property . . . " Act of Feb. 5, 1903, ch. 487, 32 Stat. 797 (1903). App. 2a. Thus, as of 1903, the bar to discharge was *not* provoked by only false "financial statements" but instead, by any false

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[19] App. 1a.

statement in *writing* that was "material." There is no indication that this section only referred to a formal financial statement; then and now, the concern was with the materiality of the non-disclosure.

As early as 1910, however, Congress became aware of overly harsh interpretations of § 14b and determined that debtors needed greater protection from loss of discharge. This legislative history is described by the Fourth Circuit in *J.W. Ould Co. v. Davis*, 246 F. 228, 231 (1917). That case involved a creditor who sought to block a discharge of a merchant who had provided a false inventory to an independent credit company, which later gave the report to a creditor of the merchant. The court refused to deny the discharge. The Fourth Circuit noted the comments by the Senate Judiciary Committee, in responding to a bill passed by the House in 1910, stating as follows:

> Any tendency to make the bankrupt act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing where that statement was specifically asked for by the creditor or by the creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee. Merchants are likely to make careless general statements where they would be very careful were they making

> statements to creditors from whom they were at the time asking credit.

Id.[20]

Ould was not concerned with the form of the statement, but with issues of materiality and reliance. The larger question was whether a discharge could be lost through more typical, "careless" comments made by merchants. What the case recognized was that Congress and the courts did not want to make a debtor's "careless general statements" be grounds to bar a discharge. It seems unlikely that "careless general statements" were meant to denote something said *only* in a formal financial statement. Instead, the loss of the discharge should occur only upon a finding of actual reliance and materiality of the statement. This same logic pertains today.

In 1926, the word "respecting" first appears in connection with the discharge exception in a House Conference Report concerning amending § 14b of the Act. H. Rep. No. 69-1257, at 3 (1926) (Conf. Rep.). App. 8a. Section 14b of the Act was then amended to reflect these comments.[21] The 1926 amendment changed § 14b to read that a debtor may not receive a discharge of any debt if the debtor has "obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, *in any manner whatsoever, a materially false statement in writing respecting his financial condition*". App. 10a (emphasis added.)

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[20] The Court was evidently referring to S. Rpt. No. 61-691 (1910) App. 4a. See similar discussion in H. Rpt. No. 69-1257 (1926). App. 7a.

[21] Act of May 27, 1926, Pub. L. 69-301, 44 Stat. 662. App.10a.

Petitioner argues the 1926 amendment was added to close the so-called "loophole" in *Ould,* and thus was intended only to protect creditors against the discharge of a debt where the creditor relied on a false financial statement prepared by a debtor and given to a credit agency. Pet. Br. 8–9. Petitioner thus ignores that while Congress observed the specific problem with credit reporting agencies, its broader concern was with the general problem of creditor abuse by asserting fraud based on careless or general statements, as *Ould* makes clear. One need only look to later House Reports to see that this concern lingered over the next few decades. *See* H. Rep. No. 86-1111 (1959). App. 15a.

Nothing in the text of the 1926 amendment supports a reading that Congress was now only concerned with formal financial statements. What Congress actually wrote reflects a concern for materially false written statements of any kind and in any manner. The concern was broad and was not limited to formal financial statements. Indeed, Petitioner concedes that this amendment was drafted to be "as broad as [its authors] could do it." Pet. Br. 9. A materially false statement could be in any kind of document, including but not limited to a full financial statement. This same language remained equally broad once it became the exception to the exception.

B. In 1960 and 1978, Congress added greater debtor protection from loss of the discharge in view of creditor abuse of the discharge provisions.

In 1960 and again in 1978, Congress continued its movement toward protecting the debtor against loss of the discharge. This was largely the result of findings regarding institutional creditor abuse of the discharge provisions. Most broadly, Congress effectively rebalanced

its concerns about the "honest debtor" against the well-documented intimidation tactics of the consumer creditor institutions and its concern that "careless" comments become the basis to block a discharge.

By 1959 and 1960, both houses of Congress noted that the discharge provisions were being abused by institutional creditors who sought to intimidate debtors by threatening loss of discharge due to allegedly false statements. *See, e.g.*, S. Rep. No. 86-1688 (1960) App. 22a and H. Rep. No. 86-1111 (1959) App. 15a. Specifically, Congress observed that the consumer credit industry was abusing the discharge provisions by inducing debtors to sign incomplete and hence "fraudulent" financial statements in order to insulate themselves from having their debt discharged. *See Field*, 516 U.S. at 74–77. "Unscrupulous" lenders "armed with false financial statement[s]" could thus threaten an unwary debtor's entire discharge unless the debtor agreed to fully pay the lenders' claims after discharge. S. Rep. No. 86-1688 (1960). App. 23a.

In view of this risk of intimidation by threats of discharge litigation, Congress proposed that the Bankruptcy Act be amended so that only business debtors were subject to the complete bar to discharge due to false statements. S. Rep. No. 86-1688 (1960). App. 22a. "[T]he Committee believes that it is desirable to eliminate the false financial statement as a ground for the complete denial of a discharge insofar as the individual noncommercial bankrupt is concerned." *Id.* App. 24a. "It is also a penalty which experience has shown is subject to abuse." *Id.* App. 23a. Accordingly, the 1960 amendments transferred the language concerning false statements by individuals from § 14 (where it barred any discharge) to § 17a(2) where it now barred only the debt incurred

as a result of the false statement. Act of July 12, 1960, Pub. L. 86-621, 74 Stat. 408-409. App. 33a-34a. (*See also*, *Field*, 516 U.S. at 65–66, stating that § 17a(2) was the precursor to § 523(a)(2)(A)).

The second key turning point occurred in 1978 when the Bankruptcy Code replaced the Bankruptcy Act. Congress expressly noted its goal of modernizing bankruptcy law and addressing the "second major problem . . . [of] the inadequacy of relief that the Bankruptcy Act provides for consumer debtors." *Id.* App 41a. As Professor Ronald Mann noted, one of the central goals of the Bankruptcy Reform Act of 1978 was to provide a "broader discharge for debtors in Chapter 7." Ronald J. Mann, *Bankruptcy and the U.S. Supreme Court* 28 (2017).

Congress remained concerned over the abuse of the discharge provision concerning false statements and that an exception to discharge could be sought even where the debtor had no intent to deceive or where the "merits of the case are weak." *Id.* App. 47a-48a. Significantly, the House Report described its concern with a "false statement in writing *concerning* the debtor's financial condition . . . . " H. Rep. 95-595. App. 44a. This comment and the use of "concerning," much like "respecting," shows that Congress was looking more broadly and well beyond merely formal financial statements.

During the drafting process, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes to the bankruptcy laws (the "Bankruptcy Commission"). H. Rep. 95-595 (1977). App. 36a. The Bankruptcy Commission was sufficiently concerned about creditor abuse of the exception to the discharge that it "recommended that the false financial statement exception to discharge be

eliminated for consumer debts." H. Rep. 95-595. App. 47a. Rather than delete the provision, Congress adopted a compromise, but it is inconceivable that in view of the consideration to delete this provision, the upshot was a bill which made the loss of discharge by creditor aggressive conduct *more likely* rather than less likely.

The legislative history of § 523(a)(2) and its predecessors fully reflect that Congress has consistently moved toward greater protection of the discharge. Petitioner's brief suggests a narrative of Congress moving in the opposite direction and making discharge less available. Yet, Petitioner does not dispute that the legislative history contains a detailed discussion of Congress' concern over creditor abuse of the discharge provisions. Congress' response to this abuse was to provide broader protection against loss of the discharge, not to re-define the established meaning of "financial condition." This concern over creditor abuse hardly squares with Petitioner's conclusion that Congress therefore must have meant to give the very same institutional creditors *greater* leverage and intimidation opportunities by now making oral statements on "financial condition" the easy prey for a discharge challenge.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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April 2, 2018

APPENDIX

APPENDIX

Bankruptcy Act of 1898, 30 Stat. 544

* * *

SEC. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months a: subsequent to being adjudged a bankrupt, file an application for a disc barge in the court of bankruptcy in which the proceedings are pending ; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

* * *

Act of February 5, 1903, 32 Stat. 797

Approved, February 5, 1903.

CHAP. 487.—An Act To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen – hundred and ninety-eight.

* * *

SEC. 4. That subdivision b of section fourteen of said Act be, and the same is hereby, amended so as to read as follows:

"b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to he fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time sub sequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (8) in the course of the proceedings in bankruptcy ref used to obey any lawful order of or

to answer any material question approved by the court."

SEC. 5. That section seventeen of said Act be, and the same is hereby, amended so as to read as follows:

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

* * *

SENATE

61ST CONGRESS **REPORT**
2d Session **No. 691**

AMENDMENT OF THE BANKRUPTCY ACT

MAY 16, 1910.—Ordered to be printed.

Mr. BACON, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 20575.]

The Committee on the Judiciary, to whom was referred the bill (H.R. 20575) entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended," etc., have had the same under consideration, and report it back with amendments.

The report of the Judiciary Committee of the House of Representatives on said bill is hereby concurred in with the additions and reservations hereinafter indicated and explained in connection with the different sections treated. That report states:

The experience of the seven years elapsing since the amendment of February 5, 1903, in the administration of the bankruptcy law has developed certain defects which seem to the committee to require additional legislation to reconcile conflicting decisions of the courts, to make the law more just to debtor and creditor, and also to correct certain faults in its administrative features, which, despite the obvious intention of

the framers of the present law as well as of those who framed the amendment of 1903, have crept in through loopholes that have developed. Hence the introduction and approval of the bill which this report accompanies. In explanation of this bill the following statement is submitted:

* * *

Section 6. The House bill seeks to make three changes in subdivision–b of section 14 of the present law, relative to opposition to discharge. First, it provides that trustees shall be competent "parties in interest" to object to a discharge; second, that they can so object only when authorized at a meeting of creditors; and, third, that a materially false mercantile statement, if made to the trade and relied on by the creditor, shall be an available objection to the debtor's discharge.

Your committee concur in the first two of these changes, but do not concur in the last.

The first of these changes, making the trustee a competent party to oppose a bankrupt's discharge, is a desirable change, as thereby the expense of the proceedings in opposition to discharge will ho spread over all of the creditors, and not be borne by a single creditor who may file objections. Moreover, it lessens the danger of improper oppositions to discharge by single creditors for the purpose of forcing settlements.

The second change, namely, that, the trustee can only oppose discharge when authorized to do so at a meeting of creditors, is also desirable, affording a proper check upon improvident and improper opposition to discharge. In view of the fact that "entry of appearance" in opposition to discharge must be made at the return tune of the ten days' notice provided

by section 58, but that the meeting of creditors for authorizing such opposition also must be upon ten days' notice—thus preventing creditors meetings being held before the expiration of the time for entering appearance in opposition—it has been found necessary to amend section 58 by providing for thirty days' notice of the filing of discharge applications in the place of the ten days' notice at present prescribed, in this way sufficient time being given for the creditors to hold their meeting.

The third change made by the House bill, that which in effect would make the obtaining of property on false written statements to mercantile agencies ground of opposition to discharge, without the creditor whose property has thus been obtained first asking such mercantile agencies to procure him the written statement, is not concurred in by your committee. Any tendency to make the bankrupt act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing where that statement was specifically asked for by the creditor or by the creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your our committee. Merchants are likely to make careless general statements where they would be very careful were they making statements to creditors from whom they were at the time asking credit.

Your committee propose a substitute for the House amendment of this ground of opposition to discharge, which is thought to go as far as is proper.

* * *

HOUSE OF REPRESENTATIVES

69TH CONGRESS **REPORT**
1st Session **No. 1257**

ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY

MAY 19, 1926.—Ordered to be printed

Mr. CHRISTOPHERSON, from the committee of conference, submitted the following

CONFERENCE REPORT
(To accompany S. 1039]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1039) entitled, "To amend an act entitled, 'An act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and acts amendatory thereof and supplementary thereto, "having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with the following amendments:

In lieu of the matter proposed to be inserted by said amendment insert the following:

* * *

Sec. 6. That section 14 (a) and (b) of said act, as 80 amended, be, and the same hereby is, amended to read as follows:

"(a) Any person may, after the expiration of one month and within twelve months, subsequent to being adjudged a. bankrupt, file an *application for a discharge in the court of bankruptcy in which the proceedings are pending, if it shall be made to appear to the judge that the bankrupt aas unavoidably prevented from filing it within such time, it may be wled within but not after the expiration* of *the next six months.*

"(b). The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) destroyed, mutilated, falsified, concealed, or failed to keep books of account, or records, from which his financial condition and business transactions might be ascertained; unless the court deem such failure or acts to have been justified, under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has been granted a discharge in bankruptcy within six years; or (6) in the course of proceedings in bankruptcy, refused to obey any lawful order of or to answer any material question approved by the court; or (7) has failed to explain

satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of: an objection to a discharge the objector shall show to the satisfaction of the court, that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this paragraph (b), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt: And provided further, That the trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do by the creditors at a meeting of creditors called for that purpose on the application of any creditor."

* * *

Act of May 27, 1926, 44 Stat. 662

* * *

Sec. 6. That section 14 (a) and (b) of said Act, as so amended, be and the same hereby is, amended to read as follows:

"(a) Any person may, after the expiration of one month an within twelve months, subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

"(b) The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a, reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) destroyed, mutilated, falsified, concealed, or failed to keep books of account, or records, from which his financial condition and business transactions might be ascertained; unless the court aeon such failure or acts to have been justified, under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a, materially false statement in writing respecting his financial condition; or (4) at any time subsequent to

the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has been granted a discharge in bankruptcy within six years; or (6) in the course of proceedings in bankruptcy, refused to obey any lawful order of or to answer any material question approved by the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this paragraph (b), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt: *And provided further,* That the trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do by the creditors at a meeting of creditors called for that purpose on the application of any creditor."

* * *

Act of June 22, 1938, Pub. L. No. 75-696, 52 Stat. 850

* * *

"SEC. 14. DISCHARGES, WHEN GRANTED.—a. The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided,* That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

"b. After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct, and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 58 of this Act. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed ; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

"c. The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under this Act; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records,

from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) has within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act; or (6) in the course of a proceeding under this Act refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

"d. When requested by the court, the United States attorney, located in the judicial district in which the bankruptcy proceeding is pending, or such other attorney as the Attorney General may designate, shall examine into the acts and conduct of the bankrupt

and, if satisfied that probable grounds exist for the denial of the discharge and that the public interest so warrants, he shall oppose the discharge of such bankrupt in like manner as provided in the case of a trustee.

* * *

HOUSE OF REPRESENTATIVES

86TH CONGRESS **REPORT**
1st Session **No. 1111**

LIMITING THE USE OF FALSE FINANCIAL STATEMENTS AS A BAR TO DISCHARGE IN BANKRUPTCY

SEPTEMBER 1, 1959.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FORRESTER, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H.R. 4346]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4340) to amend the Bankruptcy Act to limit the use of false financial statements as a bar to discharge, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 2, line 16, strike out "defraud" and substitute "deceive".

On page 2, line 25, strike out "or".

On page 3, line 2, strike out "or" where it appears before (5).

EXPLANATION OF AMENDMENTS

During the subcommittee hearings, objection was expressed to the use of the word "defraud" rather than "deceive". The committee is of the view that in the context of this bill the words "defraud" and "deceive" may be defined in terms of each other. The committee,

therefore, has no objection to substituting "deceive" for "defraud".

The second and third amendments are technical amendments.

PURPOSE

The purpose of this bill is to eliminate as a ground for the complete denial of a discharge the obtaining of money or credit through false financial statements issued by a nonbusiness bankrupt.

GENERAL STATEMENT

Section 14c(3) of the Bankruptcy Act now provides that—

> The court shall grant the discharge unless satisfied that the bankrupt has * * * obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; * * *."

Section 17a(2) provides that—

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * * except such as * * * are liabilities for obtaining money or property by false pretenses or false representations * * *."

Thus, an obligation incurred on the basis of a false financial statement may result either in the nondischargeability of the particular debt or in the complete denial of a discharge.

The committee believes that complete denial of a discharge is too severe a penalty in the case of the

individual noncommercial bankrupt. It is also a penalty which experience has shown to be subject to abuse. An unscrupulous lender armed with a false financial statement has a powerful weapon with which to intimidate a debtor into entering into an agreement in which the creditor agrees not to oppose the discharge in return for the debtor's agreement to pay the debt in full after discharge. The creditor may also accomplish his purpose of preserving his debt by not opposing the discharge and then suing in a State court on the ground that the debt is not dischargeable. Testimony before the Subcommittee on Bankruptcy and Reorganization by experts in bankruptcy law indicates that unscrupulous lenders have frequently condoned, or even encouraged, the issuance of statements omitting debts with the deliberate intention of obtaining a false agreement for use in the event that the borrower subsequently goes into bankruptcy.

Even where the creditor has had no part in the issuance of a false financial statement, the exercise of his right to bar the discharge completely results in a windfall for other creditors who were not even aware of such a statement, Debts which are dischargeable are not discharged solely because one of many debts was induced by a false financial statement. This result is not required to protect a creditor who has relied on a false financial statement since under section 17a(2) that particular debt is not dischargeable.

In view of the protection which section 17a(2) gives to the creditor, and in view of the abuses which have grown out of section 14c(3), the committee believes that it is desirable to eliminate the false financial statement as a ground for the complete denial of a discharge insofar as the individual noncommercial bankrupt is concerned.

The situation is somewhat different in the case of a business bankrupt. The businessman is more likely to be aware of the severe consequences to him of issuing a false financial statement. His ordinary business records enable him to produce a more accurate statement than a householder who may have a multitude of small debts and no records. Furthermore, the financial statement issued by a businessman is frequently for the purpose of establishing credit standing in the community. His creditors may never see the financial statement itself. On the other hand, the nonbusiness debtor normally issues his financial statement to a particular creditor as part of his application for credit or for a loan. That creditor already has the protection of nondischargeability under section 17.

The bill, therefore, amends section 14c(3) to authorize the denial of a discharge only where the bankrupt has incurred an obligation—

> while engaged in business as a sole proprietor, partnership, or as an executive of a corporation * * *.

The bill also amends section 17a(2) by adding the language:

> or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to defraud.

The purpose of this amendment is to assure that although the obtaining of money or property on credit through the issuance of a false financial statement is no longer to be a ground for denial of a discharge to a

nonbusiness bankrupt, any obligation incurred as a result of such a statement is to be nondischargeable under section 17. The addition of the elements of reliance by the creditor and intent to deceive by the debtor are merely enactments of existing case law.

This bill has the support of the Judicial Conference of the United States and the National Bankruptcy Conference. During the 85th. Congress, H.R. 106, a bill dealing with this problem in a somewhat broader fashion, passed the House but was riot acted on in the Senate.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, there is printed below in roman type without brackets existing law in which no change is proposed by enactment of the bill here reported; present provisions proposed to he stricken are enclosed in black brackets; and new provisions proposed to be inserted are shown in italic:

SECTION 14c(3) OF THE BANKRUPTCY ACT

SEC. 14. DISCHARGES WHEN GRANTED.—a. * * *

b. * * *

c. The court shall grant, the discharge unless satisfied that the bankrupt lies (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of accounts of records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the ease; or (3) (obtained money or property on

credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition;] *while engaged in business as a sole proprietor, partnership, or as an executive of* a *corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation;* * * *.

SECTION 17a OF THE BANKRUPTCY ACT

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, *or for obtaining money or property on credit or obtaining an extension. or renewal of credit in. reliance upon a materially ,false statement in writing respecting his financial condition made or published or caused to be made or published in. any manner whatsoever with intent to deceive,* or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had

notice or actual knowledge of the proceedings in bankruptcy; [or] (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; [or] (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerics, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment.

SENATE

86TH CONGRESS
2nd Session

REPORT
No. 1688

LIMITING THE USE OF FALSE FINANCIAL STATEMENTS AS A BAR TO DISCHARGE IN BANKRUPTCY

JUNE 24, 1960—Ordered to be printed

Mr. HRUSKA, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4346]

The Committee on the Judiciary, to which was referred the bill (H.R. 4346) to amend the Bankruptcy Act to limit the use of false financial statements as a bar to discharge, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to limit the use of false financial statements as a bar to discharge in bankruptcy.

STATEMENT

The Administrative Office of the U.S. Courts recommends the bill favorably.

Section 14 of the Bankruptcy Act, entitled "Discharges, When Granted," now provides in c(3) that the court shall grant the discharge unless satisfied that the bankrupt has—

> obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition;

The bill would substitute in lieu of this the following language—

> while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation;

The Committee on the Judiciary of the House of Representatives in favorably reporting the bill has commented as follows in regard to this change:

> The committee believes that complete denial of a discharge is too severe a penalty in the case of the individual noncommercial bankrupt. It is also a penalty which experience has shown to be subject to abuse. An unscrupulous lender armed with a false financial statement has a powerful weapon with which to intimidate a debtor into entering into an agreement in which the creditor agrees not to oppose the discharge in return for the debtor's agreement to pay the debt in full after discharge. The creditor may also accomplish his purpose of preserving his

debt by not opposing the discharge and then suing in a State court on the ground that the debt is not dischargeable. Testimony before the Subcommittee on Bankruptcy and Reorganization by experts in bankruptcy law indicates that unscrupulous lenders have frequently condoned, or even encouraged, the issuance of statements omitting debts with the deliberate intention of obtaining a false agreement for use in the event that the borrower subsequently goes into bankruptcy.

Even where the creditor has had no part in the issuance of a false financial statement, the exercise of his right to bar the discharge completely results in a windfall for other creditors who were not even aware of such *a* statement. Debts which are dischargeable are not discharged solely because one of many debts was induced by a false financial statement. This result is not required to protect a creditor who has relied on a false financial statement since under section 17a (2) that particular debt is not dischargeable.

In view of the protection which section 17a(2) gives to the creditor, and in view of the abuses which have grown out of section 14c(3), the committee believes that it is desirable to eliminate the false financial statement as a ground for the complete denial of a discharge insofar as the individual noncommercial bankrupt is concerned.

The situation is somewhat different in the case of a business bankrupt. The businessman is more likely to be aware of the severe consequences to him of issuing a false

> financial statement. His ordinary business records enable him to produce a more accurate statement than a householder who may have a multitude of small debts and no records. Furthermore, the financial statement issued by a businessman is frequently for the purpose of establishing credit standing in the community. His creditors may never see the financial statement itself. On the other hand, the nonbusiness debtor normally issues his financial statement to a particular creditor as part of his application for credit or for a loan. That creditor already has the protection of nondischargeability under section 17.

The bill also amends section 17 of the Bankruptcy Act, entitled, "Debts Not Affected by a Discharge," by adding in a(2) the following new language—

> or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive,

The Committee on the Judiciary of the House of Representatives in its report on the bill has commented in regard to this addition—

> The purpose of this amendment is to assure that although the obtaining of money or property on credit through the issuance of a false financial statement is no longer to be ground for denial of a discharge to a nonbusiness bankrupt, any obligation

> incurred as a result of such a statement to be nondischargeable under section 17. The addition of the elements of reliance by the creditor and intent to deceive by the debtor are merely enactments of existing case law.

The committee believes that the bill as recommended by the Administrative Office of the U.S. Courts and as passed by the House of Representatives is meritorious and recommends it favorably.

Attached and made a part of this report are (1) a letter, dated January 15, 1960, from the Administrative Office of the U.S. Courts; (2) a letter, dated March 21, 1960, from the Secretary of the Treasury; (3) a letter, dated June 1, 1960, from the Department of Justice; and (4) a letter, dated June 13, 1960, from the American Bankers Association.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., January 15, 1960

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary.
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: The bill (H.R. 4316) to amend the Bankruptcy Act to limit the use of false financial statements as a bar to discharge was on September 1, 1959, reported favorable by the House Judiciary Committee to the House with minor amendments (H. Rept. 1111). It passed the House as reported on September 7, 1959, and it is now pending before the Senate Judiciary Committee. The amendments arc stated in the House report as follows:

On page 2, line 16, strike out "defraud" and substitute "deceive".

On page 2, line 25, strike out "or".

On page 3, line 2, strike out "or" where it appears before (5).

During the subcommittee hearings, objection was expressed to the use of the word "defraud" rather than "deceive." The committee was of the view that in the context of the bill the words "defraud" and "deceive" may be defined in terms of each other and it, therefore, had no objection to substituting "deceive" for "defraud."

The second and third amendments are merely technical amendments.

The Judicial Conference at its March 1959 meeting reaffirmed its approval of the language contained in the original bill, H.R. 4346. In view of this and since the amendments made by the House are of a clarifying or technical nature we hope the bill will be enacted into law as so amended.

Sincerely yours,

AUBREY GASQUE,
Assistant Director.

OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, March 21, 1960.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

MY DEAR MR, CHAIRMAN: This is in response to your request for the Department's views on H.R. 4346, to amend the Bankruptcy Act to limit the use of false financial statements as a bar to discharge.

The proposed legislation amends section 14c(3) of the Bankruptcy Act. (11 U.S.C. 32(c) (3) to eliminate as a ground for the denial of a discharge, insofar as the nonbusiness bankrupt is concerned, the obtaining of money or credit through false financial statements. It further amends section 17a(2) of the act (11 U.S.C. 35(a)(2) to make clear that, although the obtaining of money or property on credit through the issuance of a false financial statement is no longer to be a ground for denial of a discharge to a nonbusiness bankrupt, the particular obligation incurred as a result of such a statement is to remain nondischargeable.

The subject matter of this bill does not appear to have any adverse effect upon the treatment of Federal tax claims in Bankruptcy Act proceedings. Accordingly, the Treasury Department expresses no views on the merits of H.R. 4346.

The Bureau of the Budget has advised the Treasury Department that there is no objection to the presentation of this report.

Sincerely yours,

JAY W. GLASMANN,
Assistant to the Secretary.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., June 1, 1960.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning (H.R. 4346) to amend the Bankruptcy Act to limit the use of false financial statements as a bar to discharge.

Section 14c(3) of the Bankruptcy Act (30 Stat. 550, as amended; 11 U.S.C. 32(c)(3)) provides that a discharge in bankruptcy shall be refused if the court is satisfied that the bankrupt obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published a materially false financial statement in writing.

The bill would amend the section to limit this ground for denying a discharge to bankrupts who furnished such false statements while engaged in business as a sole proprietor, partnership, or an executive of a corporation.

The bill would also amend section 17 of the Bankruptcy Act (30 Stat. 550, as amended; 11 U.S.C. 55(a)), which now provides in part that a discharge does not release a bankrupt from debts which are liabilities for obtaining money or property by false pretenses or false representations. Under the proposed amendment, liabilities for obtaining money or property on credit, or obtaining an extension or a renewal of credit, by furnishing false financial statements would similarly be unaffected by the discharge.

The subject of this legislation is not a matter for which the Department of Justice has primary responsibility, and accordingly we make no recommendation as to the enactment of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

JOHN D. CALHOUN,
Acting Deputy Attorney General.

THE AMERICAN BANKERS ASSOCIATION,
WASHINGTON OFFICE,
Washington, D.C., June 13, 1960.

Re H.R. 4846.
Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
New Senate Office Building, Washington. D.C.

DEAR SENATOR EASTLAND: In a letter dated January 13, I indicated that the American Bankers Association objected to enactment of H.R. 43-16, which amends the Bankruptcy Act. The association has reconsidered this legislation, and I am authorized to advise you that the association is removing its objection to enactment of H.R. 4346.

Sincerely yours,

J. OLNEY BROTT.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rifles of the Senate, changes in existing law made by the bill: as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman) :

SECTION 14c(3) or THE BANKRUPTCY ACT

SEC. 14. DISCHARGES, WHEN GRANTED.—a. * * *

b. * * *

c. The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of accounts of records, from which his financial condition and business transactions might be ascertained, unless the court deems such nets or failure to have been justified under all the circumstances of the case; or (3) [obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition;] *while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; * * *.*

SECTION 17a OF THE BANKRUPTCY ACT

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, *or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive,* or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; [or] (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; [or] (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (8) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment.

Act of July 12, 1960, Pub. L. No. 86-621 74 Stat. 408

* * *

AN ACT

To amend the Bankruptcy Act to limit the use of false financial statements as a bar to discharge.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 14c (3) of the Bankruptcy Act, as amended (11 U.S.C. 32 (c) (3)), is amended to read as follows :

> "(3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation: or"

SEC. 2. Subdivision a. of section 17 of the Bankruptcy Act, as amended (11 U.S.C. 35a), is amended to read as follows:

> "a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an exten-

sion or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for ,seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity ; (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment."

Approved July 12, 1960.

Public Law 86-622

HOUSE OF REPRESENTATIVES

95th Congress **Report**
1st Session **No. 95-595**

BANKRUPTCY LAW REVISION

September 8, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Edwards of California, from the Committee on the Judiciary, submitted the following

REPORT OF THE COMMITTEE ON THE JUDICIARY together with SEPARATE SUPPLEMENTAL, AND SEPARATE ADDITIONAL VIEWS

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 8200]

The Committee on the Judiciary, to whom was referred the bill (H.R. 8200) to establish a uniform law on the subject of Bankruptcies, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass. The committee amendment strikes out all after the enacting clause and inserts a new text, which appears in italic type in the reported bill.

The amendment is an amendment in the nature of a substitute for the bill, incorporating six substantive amendments adopted by the committee, and numerous technical, drafting, and style changes to the bill. A detailed description of the six amendments adopted

during committee deliberations is incorporated into the description of the bill contained in this Report, which addresses itself to the amendments in the nature of a substitute. Briefly summarized, they are as follows:

* * *

Introduction
I. History

In 1970, congress created the commission on the bankruptcy laws of the United States to study and recommend changes in the bankruptcy laws.[1] The commission became operational in June, 1971, and filed its final report with the Congress on July 30, 1973.[2] Its report was in two parts. Part I contained the Commission's findings and recommendations. Part II contained a draft of a bill to implement those recommendations. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights and a Member of the Commission, and Charles Wiggins, then ranking minority Member of the Subcommittee

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[1] Established by Pub. L. 91-354, Act of July 24, 1970, 84 Stat. 468, the Commission consisted of nine members. Three, including the chairman, were appointed by the President: Chairman Harold Marsh, Jr., Los Angeles, Calif.; Charles Seligson, New York, N.Y.; and Wilson Newman, Short Hills, N.J. Two each were appointed by the Speaker of the House and the President of the Senate: Hon. Don Edwards (D., Calif.), Hon. Charles E. Wiggins (R. Calif.), Hon. Quentin N. Burdick (D., N. Dak.), and Hon. Marlow W. Cook (R., Ky.). Two were appointed by the Chief Justice: Hon Edward Weinfeld (S.D.N.Y.), and Hon. Hubert L. Will (N.D. Ill.). The study leading to the creation of the Commission actually began in 1968, when the Subcommittee on bankruptcy of the Senate Committee on the Judiciary began hearings. *Hearings on S.J. Res. 100 before the Subcomm. on bankruptcy of the Senate Comm. on the Judiciary*, 90th cong., 2d sess. (1968).

[2] H.R. Doc. No. 93-137 (1973).

and also a Member of the Commission, introduced that bill in the 93d Congress as H.R. 10792.[3]

The National Conference of Bankruptcy Judges disagreed with major aspects of the Commission's bill, and drafted and proposed an alternative. The Judges bill was also introduced in the 93d congress by Messrs. Edwards and Wiggins as H.R. 16643.[4] In the 94th Congress, both of these bills were again introduced, as H.R. 31 and H.R. 32, respectively.[5]

Hearings began on both bills in the 94th Congress in May, 1975, and continued until May, 1976. The hearings were extensively publicized in the Congressional Record, and all interested parties were encouraged to present views to the Subcommittee. There were 35 days of hearings, over 100 witnesses, and over 2,700 pages of testimony.[6] The hearings covered every aspect of bankruptcy law, from the structure of the bankruptcy system to the jurisdiction of bankruptcy courts, from consumer bankruptcy to business reorganizations, from the interaction of the securities laws with bankruptcy to the tax aspects of bankruptcy, from railroad reorganization to commodity broker liquidation.

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[3] 93d Cong., 1st Sess. (1973).

[4] 93d Cong., 2d Sess. (1974).

[5] 94th Cong., 1st Sess. (1975).

[6] *Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st and 2d Sess., ser. 27 (1975-76). The Senate also conducted extensive hearings. *Hearings on S. 235 and S. 236 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong.,1st Sess. (1975).

After the hearings were completed, the process of bill drafting began. The result was H.R. 6,[7] cosponsored by Chairman Edwards, and by Mr. Butler, current ranking minority Member of the Subcommittee. Since the introduction of H.R. 6, the Subcommittee has received numerous comments from the bench, the bar, and academia.

The Subcommittee on Civil and Constitutional Rights began mark-up of the bill on March 21, 1977. Mark-up continued for 22 days, spread over eight weeks. The Members of the Subcommittee examined and discussed every one of the over 300 sections of the bill during its forty-two hours of mark-up, in addition to its debate on the bill as a whole. Over 120 amendments were proposed and debated. Over 100 were adopted. The Subcommittee completed its work on the bill on May 16, 1977, when it reported the bill favorably by a roll call vote of 7-0. The bill as amended, with numerous additional technical, drafting, and style corrections, was ordered introduced as a clean bill. Chairman Edwards, joined by the other Members of the Subcommittee, introduced H.R. 8200[8] on July 11, 1977.

The Committee on the Judiciary began deliberations on the bill on July 14, 1977, and continued work on July 15, and July 19. On July 19, the bill was ordered reported by a roll call vote of 26-3, with one Member voting present.

On July 19, the Committee was informed of a potential jurisdictional conflict with the Ways and Means Committee over certain tax provisions in the

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[7] 95th Cong., 1st Sess. (1977).

[8] 95th Cong., 1st Sess. (1977) [hereinafter cited as H.R. 8200].

bill.[9] The Chairman of the two Committees met to reach an agreement on the proper disposition of the potential claim of jurisdiction asserted by the Ways and Means Committee. Under the agreement, the Ways and Means Committee would not request a sequential referral of the bill if the Judiciary Committee made the four special tax provisions contained in the bankruptcy code proposed by the bill inapplicable to Federal Taxes.[10]

On September 8, the Committee on the Judiciary met to consider the proposal. The Committee voted to reconsider the vote to report H.R. 8200, adopted the amendment in the nature of a substitute, and once again ordered the bill reported favorably, by a roll call vote of 23-8.

II. Major Provisions

The major purpose of this bill is the modernization of the bankruptcy laws. The substantive law of bankruptcy and the current bankruptcy system was designed in 1898,[11] in the horse and buggy era of consumer and commercial credit, and was last overhauled in 1938,[12] nearly 40 years ago. It has only been since 1938 that the consumer credit industry has grown; and it has only been since the widespread adoption of the Uniform Commercial Code in the early 1960's that commercial credit has grown to its present magnitude. As the issue of bankruptcy has fallen from the national consciousness since the Great Depression in the 1930's

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[9] Letter from Chairman Al Ullman to Chairman Peter W. Rodino, Jr., July 19, 1977.

[10] H.R. 8200 § 101 (proposed 11 U.S.C. 346, 728, 1146, 1331).

[11] Act of July 1, 1898, C. 541, 30 Stat. 544.

[12] Act of June 22, 1938, C. 575, 52 Stat. 840.

the bankruptcy system has fallen into disrepair. Those once primarily responsible for its operation and maintenance, the district judges, have turned to other matters and neglected their bankruptcy responsibilities. The bankruptcy judges instead have taken over prime responsibility for the operation of the system, even though their offices are not designed statutorily to perform those duties. Both substantively and administratively, the bankruptcy system is straining on all sides to handle situations that the framers of the current law never dreamed would arise.

The Bankruptcy Commission found, and hearings before the Subcommittee on Civil and Constitutional Rights confirmed, that the most severe problem in the bankruptcy administration was the court system. The problem consists of two facets. First, the bankruptcy court today is not truly and completely a court. It is not independent. It must operate under the supervision of an unconcerned district court. This supervision has hampered bankruptcy court operations both administratively and substantively. This bill gives the bankruptcy court the independence it needs to operate in today's complex bankruptcy world.[13]

Second, the bankruptcy judge, because of the duties imposed upon him under the Bankruptcy Act, must take an active role in supervising and administering a bankruptcy case. No matter how fair a bankruptcy judge is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum. The bill removes many of the supervisory functions from the judge in the first instance, transfers most of them to the trustee and to the United States trustee, and involves the

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[13] *See* chapter 1, *infra*.

judge only when a dispute arises. Because the judge no longer will have to take an active role in managing bankruptcy cases, the bankruptcy court should become a forum that is fair in fact and in appearance as well.

Some of the supervisory functions removed from the judge will be transferred to a new system of United States trustees who will act as bankruptcy watchdogs, overseeing the qualifications and appointments of private trustees in bankruptcy cases, supervising their performance, monitoring their fees, and serving as trustees in cases where a private trustee cannot be found to serve.[14]

The second major problem under current bankruptcy law is the inadequacy of relief that the Bankruptcy Act provides for consumer debtors. The last major revision of the Bankruptcy Act was in 1938, before any significant amount of consumer credit had been extended. In the post-War years, consumer credit has become a major industry, and buying on time has become a way of life for a large segment of the population. The bankruptcy rate among consumers has risen accordingly, but without the required provisions in the Bankruptcy Act to protect those who need bankruptcy relief. This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor.[15]

This is not primarily a debtor's bill, however. The bill codifies creditors' rights more clearly than the case law, which is in many ways just developing. It defines the protections to which a secured creditor is entitled, and the means through which the court may grant

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[14] *See* chapter 2, *infra*.

[15] *See* chapter 3, *infra*.

that protection.[16] In the consumer area, proposed chapter 13 encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge.[17]

The Bankruptcy Act now contains four chapters for commercial reorganizations.[18] These chapters, and the divisions between them, were written in the 1930's, at a time when the law of commercial reorganization was little developed. The experience and development of the past forty years has made the current four chapters difficult to use, and the divisions between them have been shown to be arbitrary and of limited utility. The bill consolidates all four chapters into one business reorganization chapter (with some special provisions for railroad reorganizations) and rationalizes the various forms of relief available to a failing business, making a business reorganization a quicker, more efficient procedure, and providing greater protection for debtors, creditors, and the public interest.[19]

Commercial financing has undergone significant changes since the nearly universal adoption of the Uniform Commercial Code in the 1960's. The Bankruptcy Act has not yet been revised to account for the changes in the industry. The bill modernizes bankruptcy law in its interaction with commercial financing, in the areas of preferences and protection of both

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[16] *See* chapter 4, *infra*.

[17] *See* chapter 3, *infra*.

[18] Bankruptcy Act, cc. VII, X, XI, XII.

[19] *See* chapter 5, *infra*.

the debtor and secured creditors during a bankruptcy case.[20]

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The bill makes changes in other areas of the discharge. In liquidation cases, only individuals will be entitled to a discharge.[70] In reorganization and individual repayment plan cases, the existence of circumstances that would bar discharge, such as misconduct or the six-year bar, will not be a bar to confirmation of a plan.[71] As the bankruptcy commission notes:[72]

> Neither the interests of creditors nor the principles of sound bankruptcy administration requires a denial of confirmation due to conduct on the part of the debtor which would bar a discharge. If the debtor wants to pay his debts pursuant to a plan, and if the creditors are willing to go along, he should be allowed to do so. The fact that a discharge would not be available in a liquidation case should furnish a greater incentive for the debtor to perform under the plan.

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[20] *See* chapter 4, *infra*.

[70] *Id.* (proposed 11 U.S.C. 727(a)(1)).

[71] *Id* (proposed 11 U.S.C. 1129, 1141, 1325, 1328).

[72] COMMISSION REPORT, pt. I, at 175.

2. Exceptions to discharge

H.R. 8200 carries over from current law the concept that certain debts should be excepted from discharge.[73] That is, certain debts should continue to be obligations of the debtor after bankruptcy notwithstanding the bankruptcy discharge. However, the bill makes several changes in the debts excepted. Tax debts continue to be nondischargeable to a limited degree, but the time period for accumulation of taxes that are excepted from discharges is reduced in the case of all but income taxes, and the measurement of the time period is better defined.[74] Debts for alimony, maintenance, and support continue to be nondischargeable, with some changes.[75] Debts not listed by the debtor also continue to be nondischargeable, but the category of nonlisted debts is better articulated and defined.[76]

The bill continues the exception to discharge based on a false statement in writing concerning the debtor's financial condition, but with some modifications,[77] and rejects the notion that educational loans should be excepted from discharge.[78]

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[73] Bankruptcy Act § 17a, 11 U.S.C. 35(a) (1970).

[74] *Compare* H.R. 8200 § 101 (proposed 11 U.S.C. 507(6), 523(a)(11) *with* Bankruptcy Act § 17a(1), 11 U.S.C. 35(a)(1).

[75] *Compare* H.R. 8200 § 101 (proposed 11 U.S.C. 523(a)(5)) *with* Bankruptcy Act § 17a(7), 11 U.S.C. 35(a)(7). *See* Schiffman V. Wasserman, 3 Bankr. Ct. Dec. 467 (D.R.I. 1977) (Votolato, bankruptcy judge).

[76] *Compare* H.R. 8200 § 101 (proposed 11 U.S.C. 523(a)(3)) *with* Bankruptcy Act § 17a(3), 11 U.S.C. 35(a)(3).

[77] *Compare* H.R. 8200 § 101 (proposed 11 U.S.C. 523(a)(2)) *with* Bankruptcy Act § 17a(2), 11 U.S.C. 35(a)(2).

[78] *See* H.R. 8200 § 316.

a. False financial statements

A debt for obtaining money, property, or services, or an extension or renewal of credit by use of a statement in writing respecting the debtor's financial condition, that is materially false, that the debtor made or published with intent to deceive, and on which the creditor reasonably relied, is excepted from discharge under the bill.[79] The amount of the debt made non-dischargeable on account of a false financial statement is not limited to "new value" extended when a loan is rolled over. If an initial loan is made subject to a false financial statement and new money is advanced under a subsequent loan that is not made under conditions of fraud or false pretenses, then only the initial amount of the loan made on the original financial statement is invalidated and excepted from discharge. On the other hand, where the original financial statement is made under nonfraudulent conditions and the entire loan in addition to new money is advanced under a subsequent false financial statement, the entire loan is made under fraudulent conditions. This rule is sound as a matter of policy because the creditor relies to his detriment with respect to the entire amount advanced under the false financial statement. Legal rights with respect to the amount previously advanced may be altered; interest rates may be changed, maturity dates may be extended, and legal remedies may be forgone in reliance on the new false financial statement. However, if the terms of the new agreement are identical to the old agreement with respect to the old money, then no new money was obtained by a false statement on which the creditor relied since the creditor's rights were unchanged; therefore, only that portion of the false financial

[79] H.R. 8200 § 101 (propos

statement that applied to new money would be nondischargeable. In addition, the bill contains a provision that a creditor that requests a determination of the dischargeability of a consumer debt under this exception to discharge and that loses the ensuing litigation must pay the debtor's costs and attorney's fees, and may be required to pay any actual pecuniary damages resulting from the litigation.[80] Current law provides a nearly identical exception to discharge.[81] The differences are that current law does not cover a debt for services, and requires only reliance, not reasonable reliance, by the creditor on the statement. The courts have recently begun to require that the reliance be reasonable, however.[82] Current law does not, however, contain a provision granting costs, attorney's fees, and damages to a consumer debtor.

The premise of the exception to discharge is that a creditor that extended credit based on misinformation or fraudulent information transmitted by the debtor should be protected. The provision, however, has led to abuse in consumer cases, and has frustrated the fresh start goal of the bankruptcy discharge.

It is a frequent practice for consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding.[83] While the consumer finance companies use these statements in evaluating the credit risk, very often the statements are used as a basis for a false financial statement exception to discharge. The forms that the applicant fills out often have too little space for a

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[80] *Id.* (proposed 11 U.S.C. 523(d)).

[81] Bankruptcy Act § 17a(2), 11 U.S.C. 35(a)(2).

[82] *Hearings*, pt. 2, at 981-1006.

[83] *Hearings*, pt. 2, at 759-60, 942, 990-92.

complete list of debts. Frequently, a loan applicant is instructed by a loan officer to list only a few or only the most important of his debts. Then, at the bottom of the form, the phrase "I have no other debts" is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting. In addition, the form states that the creditor has relied on the statement in granting the loan.

However, the creditor often has other sources of information, such as credit bureau reports, to verify the accuracy of the list of debts. Nevertheless, if the debtor files bankruptcy, creditors with these financial statements are in a position to threaten the debtor with litigation to determine the dischargeability of the debt, based on the false financial statement exception to discharge. Most often there has been no intent to deceive on the part of the debtor, and, as in so many aspects of the creditor-debtor relationship, the debtor has simply followed the creditor's instructions with little understanding of the consequences of his action.

Creditor practices in this area have been so strong that the Bankruptcy Commission recommended that the false financial statement exception to discharge be eliminated for consumer debts.[84] This bill recognizes, however, that there are actual instances of consumer fraud, and that creditors should be protected from fraudulent debtors. It retains the exception, with small modifications. But it also recognizes that the leverage creditors have over their debtors comes not so much at the stage when the loan application is made, but rather when bankruptcy ensues.

The threat of litigation over this exception to discharge and its attendant costs are often enough to

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[84] Commission Report, pt. I, at 176; pt. II, at 136.

induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation. Thus, creditors with marginal cases are usually able to have at least part of their claim excepted from discharge (or reaffirmed), even though the merits of the case are weak. Statistics from a recent year, for example, show that approximately 8,000 cases were filed under this exception to discharge. Of those, over 5,000 were settled without trial. Of the remaining 3,000 creditors won just half.[85] If those 3,000 are representative, then it is likely that in 2,500 cases, debtors settled by agreeing to repay part of the debt, even though they would have won the case had it gone to trial.

In order to balance the scales more fairly in this area, H.R. 8200 adopts a compromise. The false financial statement exception is retained, and the creditor, as under current law, is required to initiate the proceeding to determine if the debt is nondischargeable. If the debtor prevails, however, the creditor is taxed costs and attorney's fees, and may be taxed any actual pecuniary damages, such as loss of a day's work, that the debtor might have suffered as a result of the litigation. The present pressure on the honest debtor to settle in order to avoid attorney's fees in litigation over a creditor—induced false statement is eliminated. The creditor is protected from dishonest debtors by the continuance of the exception to discharge.

The bill does not award the creditor attorney's fees if the creditor prevails. Though such a balance might seem fair at first blush, such a provision would restore the balance back in favor of the creditor by inducing debtors to settle no matter what the merits of their cases. In addition, the creditor is generally better able

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[85] *Hearings*, pt. 2, at 926.

to bear the costs of the litigation than a bankrupt debtor, and it is likely that a creditor's attorneys fees would be substantially higher than a debtor's, putting an additional disincentive on the debtor to litigate.

The costs-attorney's fees provision is mandatory. If the provision were made permissive instead of mandatory, with discretion in the court to award such amounts as were proper in each particular case, the debtor would once again be subject to the risk of paying attorney's fees and losing a day's work without pay. The balance would again shift back toward the creditor, and would put pressure on the debtor to settle. Making the provision discretionary would seriously weaken the protection it provides.

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pp. 363-365 (continuation of previous report)

(September 8, 1977)

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§ *523. Exceptions to discharge*

This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act § 17c granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1471(b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act 17c. The Rules of Bankruptcy Procedure will specify, as

they do today, who may request determinations of dischargeability, subject, of course, to proposed 11 U.S.C. 523(c), and when such a request may be made. Proposed 11 U.S.C. 350, providing for reopening of cases, provides one possible procedure for a determination of dischargeability and related issues after a case is closed.

Subsection (a) lists eight kinds of debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has been disallowed, then it would be barred by the more modern rules of collateral estoppel from reasserting that claim against the debtor after the case was closed. *See* Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures,* 88 Harv. L. Rev. 1360, 1388 (1975).

As under Bankruptcy Act § 17a(2), a debt for obtaining money, property, services, or an extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied, and that the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a(2). First, "actual fraud" is added as a grounds for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, the reliance must have been reasonable. This codifies

case law construing this provision. Third, the phrase "in any manner whatsoever" that appears in current law after "made or published" is deleted as unnecessary. The word 'published' is used in the same sense that it is used in slander actions.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a(3), follows current law, but clarifies some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for embezzlement or larceny. The deletion of willful and malicious conversion from § 17a(2) of the Bankruptcy Act is not intended to effect a substantive change. The intent is to include in the category of non-dischargeable debts a conversion under which the debtor willfully and maliciously intends to borrow property for a short period of time with no intent to inflict injury but on which injury is in fact inflicted.

Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (43 U.S.C. 656 (b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. *See Hearings*, pt. 2. at 942. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus, cases such as *In Re Waller*, 494 F.2d 447 (6th Cir. 1974); *Hearings*, pt. 3, at 1308-10, are overruled, and the result in cases

such as *Fife* v. *Fife*, 1 Utah 2d 281, 265 P. 2d 642 (1952) is followed. This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement. *See Hearings*, pt. 3, at 1287-1290.

Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker* v. *Colwell*, 193 U.S. 473 (1902), 1092 held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

Paragraph (7) excepts from discharge a debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, that is not compensation for actual pecuniary loss.

Paragraph (8) excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (b) of this section permits discharge in a bankruptcy case of an unscheduled debt from a prior case. This provision is carried over from Bankruptcy Act § 17b. The result dictated by the subsection would probably not be different if the subsection were not included. It is included nevertheless for clarity.

Subsection (c) requires a creditor who is owed a debt that may be expected from discharge under paragraph (2), (4), or (6) (false statements, embezzlement or larceny, or willful and malicious injury) to initiate proceedings in the bankruptcy court for an exception to discharge. If the creditor does not act, the debt is discharged. This provision does not change current law.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on grounds of falsity in the incurring of the debt. The debtor is entitled to costs of and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the creditor initiated the proceeding and the debt was determined to be dischargeable. The court is permitted to award any actual pecuniary loss that the debtor may have suffered as a result of the proceeding (such as loss of a day's pay). The purpose of the provision is to discourage creditors from initiating false financial statement exception to discharge actions in the hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start.

§ 524. Effect of discharge

Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts, to collect, recover, or offset any discharged debt as a personal liability of the debtor, or from property of the debtor, whether or not the debtor has waived

discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f to cover

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Act of November 6, 1978, 92 Stat. 2590

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§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this tale, does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a) (2) or 507(a) (6) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such

liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless—

(A) such loan first became due before five years before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; or

(9) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727 (a) (2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a) (1), (a) (3), or (a) (8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act,

under section 4391 of the Higher Education Act of 1965 (20 1087-3), or under section 733(g) of the Public Health Services Act (42 U.S.C. 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a ease under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) Except as provided in subsection (a) (3) (B) of this section, the debtor shall he discharged from a debt specified in paragraph (2), (4), or (6) of subsection (a) of this section. unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a) (2) of this section, and such debt is discharged, the court shall grant judgment against such creditor and in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable.

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect or recover from, or offset against, property Of the debtor of the kind specified in section 541(a) (2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523 or 1328(c) (1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a) (3) of this section does not apply if—

(1) (A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2) (A) the court would not grant the debtor's spouse a discharge in a ease under chapter 7 of this

title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727,1141, or 1328 of this title;

(2) the debtor has not rescinded such agreement within 30 days after such agreement becomes enforceable;

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